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ANTI-SUBORDINATION ABOVE ALL: SEX, RACE, AND EQUAL PROTECTION

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Two sometimes conflicting principles, anti-differentiation and anti-subordination, underlie equal protection jurisprudence. Anti-differentiation contends that it is inappropriate to treat individuals differently because of their race or sex. Thus, anti-differentiation advocates often reject affirmative action programs. Anti-subordination, by contrast, argues that it is inappropriate for groups to be subordinated in society. The latter perspective rejects policies, even if facially neutral, that perpetuate the historical subordination of groups, while embracing even facially differentiating policies that ameliorate subordination. Professor Colker argues that although many scholars have long viewed anti-differentiation as the justifiably dominant perspective, anti-subordination better explains much of the equal protection doctrine's history and case law, as well as the aversion we feel toward race and sex discrimination. She applauds judicial acceptance of the anti-subordination perspective in affirmative action cases, and suggests a framework for incorporation of the anti-subordination principle into all equal protection analysis.

INTRODUCTION

Feminists often criticize equal protection[1] doctrine for not taking

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[1] The fourteenth amendment provides, in relevant part, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Article uses the phrase "equal protection" to refer to statutory as well as constitutional claims of race or sex discrimination. Although most of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to h-6, was enacted pursuant to Congress's commerce clause power rather than pursuant to § 5 of the fourteenth amendment, see S. Rep. No. 872, 88th Cong., 2d Sess. 17, reprinted in 1964 U.S. Code Cong. & Admin. News 2355, 2366-68, both the legislative history and judicial interpretion of that statute make clear that it was meant to further the same concerns and values that are embodied in the equal protection clause. See id. at 16, 1964 U.S. Code Cong. & Admin. News 2362-65; Bureau of Nat'l Aff., The Civil Rights Act of 1964 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S.

discrimination against women seriously enough.[2] They consider the courts' use of intermediate rather than strict scrutiny[3] in assessing sex-based equal protection claims a symptom of this problem.[4] Civil rights advocates also criticize the race cases for not taking seriously enough the vision of equality for blacks. Although they generally applaud the use of strict scrutiny in race discrimination cases, they disagree with the courts' handling of some affirmative action cases.[5]

In this Article, I enter this discussion by starting from the premise that equal protection doctrine needs to do a better job understanding blacks' and womens' visions of equality and needs to have a framework that more effectively deals with the affirmative action cases. Nevertheless, I neither applaud strict scrutiny nor condemn intermediate scrutiny. I posit a new model that can gain from the benefits of both the race and sex models of equal protection. Using a comparative race-sex perspective to highlight the strengths and weaknesses of each model of equal protection, I find that intermediate scrutiny has a beneficial flexibility that is often lacking from strict scrutiny and that strict scrutiny has a seriousness that is often lacking from intermediate scrutiny. In contrast, I find that the flexibility of intermediate scrutiny sometimes causes courts to overlook serious claims of discrimination and that the inflexibility of

241, 291-94 (1964) (Goldberg, J., concurring) ("The primary purpose of the Civil Rights Act of 1964, . . . as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economies . . . . [I]n my view, Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause to enact the Civil Rights Act of 1964.").

[2] See, e.g., Cole, Strategies of Difference: Litigating for Women's Rights in a Man's World, 2 Law & Inequality 33 (1984); Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 Yale L.J. 913 (1983); Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984); Scales, Toward a Feminist Jurisprudence, 56 Ind. L.J. 375 (1980-81); Tokarz, Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality, 1 Berkeley Women's L.J. 201 (1985); Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984-85) [hereinafter Williams,Equality's Riddle]; Williams, The Equality Crisis: Some Reflections of Culture, Courts, and Feminism, 7 Women's Rts. L. Rep. 175 (1982) [hereinafter Williams, The Equality Crisis].

[3] See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981); see also text accompanying notes 172-82 infra.

[4] See Law, supra note 2, at 987-1002; Note, Gender-Based Discrimination and the Supreme Court: A Time for Strict Scrutiny, 47 Alb. L. Rev. 908 (1983). Some commentators, by contrast, have questioned whether there is even a need for any heightened scrutiny at all in sex-discrimination cases. See, e.g., J. Ely, Democracy and Distrust 164-70 (1980).

[5] See, e.g., W. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812 (1968); Bell, The Civil Rights Chronicles, 99 Harv. L. Rev. 4 (1985); Bell, Bakke, Minority Admissions, and the Usual Price of Racial Remedies, 67 Calif. L. Rev. 3 (1979) [hereinafter Bell, Bakke]; Jordan, The Black Underclass Untouched By Brown, 23 How. L.J. 61 (1980); Karst, The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977); Reid, Assault on Affirmative Action: The Delusion of Color-Blind America, 23 How. L.J. 381 (1980).

strict scrutiny often leaves them ill-equipped to respond appropriately to arguments for affirmative action.

In order to facilitate an exploration of the strengths and weaknesses of the race and sex discrimination models, I analyze two principles that underlie these models: the principles of "anti-subordination" and "anti-differentiation." Under the anti-differentiation perspective, it is inappropriate to treat individuals differently on the basis of a particular normative view about race or sex.[6] It is an individual rights perspective in two respects. First, it focuses on the motivation of the individual institution that has allegedly discriminated, without attention to the larger societal context in which the institution operates. Second, the anti-differentiation perspective focuses on the specific effect of the alleged discrimination on discrete individuals, rather than on groups.[7] Race- and sex-specific policies[8] or actions are invalid under this perspective because they reflect invidious motivation and result in dissimilar treatment for similarly situ-

[6] The "anti-differentiation" approach is similar to what Professor MacKinnon terms the "differences approach," which "envisions the sexes as socially as well as biologically *different* from one another, but calls impermissible or 'arbitrary' those distinctions or classifications that are found preconceived and/or inaccurate." C. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 4 (1979). The anti-differentiation approach described in this Article differs somewhat, in that its proponents do not always agree that biological differences should permit sex-based distinctions. See note 13 infra.

[7] However, some anti-differentiation proponents have also recognized the importance of a group-based analysis in understanding the invidiousness of sex- or race-specific rules. Professor Williams, representative of this group, has summarized this analysis.

> The first proposition essential to this analysis is that sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man. Instead of classifying on the basis of sex, lawmakers and employers must classify on the basis of the trait or function or behavior for which sex was used as a proxy. Strength, not maleness, would be the criterion for certain jobs; economic dependency, not femaleness, the criterion for alimony upon divorce. The basis for this proposition is a belief that a dual system of rights inevitably produces gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual capacities, inclinations and aspirations—at enormous cost to women and not insubstantial cost to men.

Williams, Equality's Riddle, supra note 2, at 329-30 (footnote omitted). Nonetheless, although anti-differentiation proponents like Williams may recognize the importance of a group-based perspective, this recognition seems to spring from pragmatic considerations rather than from theoretical consistency. See text accompanying note 59 infra (discussing Williams's advocacy of allowing proof of disparate impact in constitutional as well as statutory equal protection challenges).

[8] The courts' treatment of race- and sex-specific policies is the most fully developed area of equal protection law and therefore lends itself to the fullest analysis. I believe that other classifications—on the basis of sexual orientation, age, alienage, handicap, and the like—are often equally invidious. The thesis of this Article—that an anti-subordination perspective should dominate the equal protection analysis—can be applied to the treatment of any historically subjugated group.

ated individuals.[9] It is equally invidious for white men to be treated differently from black women as for black women to be treated differently from white men under this perspective, because both situations violate the preeminent norm of equal treatment. Anti-differentiation advocates therefore argue for "color-blindness" or "sex-blindness" in the development and analysis of legislative and institutional policies,[10] and frequently criticize affirmative action as violating that principle.[11]

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[9] In the race context, proponents of the anti-differentiation perspective have attacked, for example, minority set-aside programs. They argue that these programs do not promote "racial rectification" but instead cause "racism, racial spoils systems, racial competition, and racial odium." Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775, 778 (1978). In the sex discrimination context, some proponents of this perspective support passage of the Equal Rights Amendment because they believe that it would invalidate sex-based distinctions. See Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 889-93 (1971); see also note 10 infra.

[10] The articulation of this anti-differentiation perspective came to the forefront in the debate over the passage of the Equal Rights Amendment. The proposed Equal Rights Amendment stated:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

Proposed Amendment XXVII to the United States Constitution, S.J. Res. 8, S.J. Res. 9, and H.R.J. Res. 208, 92d Cong., 1st Sess. (1971).

This proposed amendment is the perfect articulation of a neutral, sex-blind perspective; it deems sex-based distinctions invidious irrespective of whether they accrue to the disadvantage of men or women. See Senate Comm. on the Judiciary, Report on Equal Rights for Men and Women, S. Rep. No. 689, 92d Cong., 2d Sess. 1 (1972). By contrast, Professor MacKinnon has suggested an Equal Rights Amendment that would embody the anti-subordination perspective. See note 122 infra.

[11] In the context of racial discrimination, Professor Van Alstyne has argued that the Court's efforts in invalidating race-specific laws during the 25 years after Brown v. Board of Education are laudable because "race-based laws have so generally tended to yield by-products and side effects so vastly . . . divisive and wretched." Van Alstyne, supra note 9, at 778. The rationale for beating back laws and policies that have discriminated against blacks does not, in his view, support the enactment of a new set of race-specific laws and policies designed to redress that prior history of discrimination. Specifically, he argues that the Court should invalidate minority set-aside programs for government contracting.

> On the confident assurance that there are still important uses for race-based laws in the more perfect ordering of this society, the Court is invited into yet another rite of passage. The suggestion, which is not new but which was always a feature of even the oldest race-based laws, is that it is not the regulating or allocating by race that is wrong or too risky per se; it is, rather, who is thus regulated, what is thus allocated, what motivates the arrangement, and what time frame should be followed.
>
> My own view of the matter is that the Court is being asked to permit not racial rectification [in reviving the licitness of race as an explicit device of government] but racial repetition [in reviving the invidious consequences of racial classification]. I think it likely, moreover, that if the Court yields once again to the Lorelei, racism, racial spoils systems, racial competition, and racial odium will be fixtures of government in the United States even into the twenty-first century.

In this Article, I argue that courts should analyze equal protection cases from an anti-subordination[12] perspective. Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities.[13] From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or

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Id. (footnote omitted).

[12] I introduce the term "anti-subordination" as a descriptive label for the approach to equal protection analysis explicated and advocated in this Article. I have chosen the term "anti-subordination" because it best describes what I, and those who share my perspective, view as the principal justification for race- or sex-specific policies.

Others have previously attempted to encompass this general approach with various descriptive labels. Professor Scales, for example, prefers the phrase "incorporationist model." Scales, supra note 2, at 435-36 (disputing notion that rules that account for unique reproductive capacities of women constitute special, unequal favoring of women).

Professor Karst uses the term "equality" to embody many of the same concepts that this Article incorporates in the phrase "anti-subordination." His premise is that

> the idea of equality carries a meaning quite removed from the empty tautology that like cases should be treated alike. This meaning is not derived from dictionaries or deductive logic, but from centuries of American experience. It is not a philosopher's universal, but a culturally specific and evolving ideal. The ideal not only *has* substantive content; it is a cluster of substantive values, with moral underpinnings solidly based in a particular society's religious and philsophical traditions.

Karst, Why Equality Matters, 17 Ga. L. Rev. 245, 249-50 (1983). Hence, although Karst does not use the phrase "anti-subordination," he clearly does not accept the premises of the anti-differentiation model.

Professor Dworkin's "banned sources" theory is similar to what this Article terms "anti-subordination." See R. Dworkin, Law's Empire 381-87 (1986). Dworkin summarizes the difference between a "banned sources" theory and a "banned categories" theory as follows: "The banned sources theory would distinguish between affirmative action programs designed to help blacks and Jim Crow laws designed to keep them in a state of economic and social subjugation. The banned category theory would treat both in the same way." Id. at 386-87.

Some commentators have used the phrases "benign purpose" or "benign classifications" to describe a model that permits some sex-specific rules to survive scrutiny. See, e.g., G. Gunther, Constitutional Law 736-87 (1985) (discussing affirmative action case law, under heading "The Benign Use of Quasi-Suspect and Suspect Criteria: Gender; Race"); Greenawalt, Judicial Scrutiny of "Benign" Racial Classifications in Law School Admissions, 75 Colum. L. Rev. 559 (1975).

This viewpoint is often called "special treatment" by advocates of the anti-differentiation perspective, see, e.g., Williams, Equality's Riddle, supra note 2, at 328, perhaps to attach a pejorative label that highlights their disagreement with an anti-subordination approach.

[13] Some proponents of sex-specific policies or actions justify these policies or actions only in contexts where biological differences exist on the basis of race or sex. See generally Scales, supra note 2, at 430-34 (explaining "bivalent" view, which places particular emphasis on biological differences between the sexes). This argument for sex-specific policies or actions is deficient, in my view, because it does not allow institutions to account for social and historical conditions in constructing new policies or actions to eliminate subordination.

sexual hierarchy.[14]

In contrast to the anti-differentiation approach, the anti-subordination perspective is a group-based perspective, in two ways.[15] First, it fo-

[14] For example, a policy excluding persons who have primary child care responsibilities from consideration for employment, although phrased in sex-neutral terms, would have a disparate impact on women. It would also perpetuate a history of sexual hierarchy by penalizing women for their societally imposed child care responsibilities. Hence, subordination opponents would seek to eliminate such a policy. See text accompanying notes 112-16 infra.

[15] Professor Fiss, among the first to articulate the anti-subordination principle within equal protection doctrine, argues that the equal protection principle need not be purely individualistic, and that courts can and should consider "elements of groupism" in evaluating whether a state's interest is legitimate. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 123 (1976). For example, he argues that

> [t]he paradigm of a state purpose that is illegitimate is couched in terms of a group: "The desire to keep blacks in a position of subordination is an illegitimate state purpose." And the standard of illegitimacy is constructed by attributing what might be viewed as a group-oriented purpose to the Equal Protection Clause—to protect blacks from hostile state action.

Id. at 123-24.

Although Fiss articulated a principle of anti-subordination, he did not attempt to resolve the legitimacy of the use of race-specific policies to overcome subordination. Others have since done so. The best compilation of writers on the anti-subordination perspective is Shades of Brown: New Perspectives on School Desegregation (D. Bell ed. 1980) [hereinafter Shades of Brown]; see also Freeman, Antidiscrimination Law: A Critical Review, in The Politics of Law 96, 110-14 (D. Kairys ed. 1982) (describing anti-discrimination law as legitimation of existing class structure).

Professor Ely has also suggested that historical issues be considered in determining whether a group is entitled to heightened scrutiny under the equal protection clause of the Constitution. See J. Ely, supra note 4. Ely's proposed framework, however, is quite different from that proposed by this Article, especially in its consideration of sex discrimination issues.

Ely focuses primarily on questions of public, political power in determining which groups have historically had power in the United States. Although the questions he asks are important, he overlooks the importance of power in the private sphere. Many feminist writers have noted the extensive oppression that women have faced in the private, family sphere through, among other things, spousal battery, inequitable custody and child support arrangements, and marital rape. See, e.g., K. Barry, Female Sexual Slavery (1979); S. Brownmiller, Against Our Will: Men, Women and Rape (1975); A. Dworkin, Woman Hating (1974). By focusing primarily on questions of political representation, Ely minimizes the significance of this form of disempowerment in women's lives. He is seemingly baffled that women's majority status in the population has not translated into equivalent influence on national politics, see J. Ely, supra note 4, at 164-65, because he does not recognize the implications of women's lack of power within the private sphere. His oversight is exemplified by the following statement: " 'Some of my best friends are Negro' got to be a parody of white hypocrisy, but *the* best friend of most men really is a woman, which eliminates the real hostility and fear that persists among the races." J. Ely, supra note 4, at 257 n.94.

The observation that a man's best friend is a woman provides no escape from oppression for women who have been raped, battered, or otherwise abused. Ely's statement may reflect women's importance to men; it ignores the oppression of women by men, and overlooks women's historical disenfranchisement and de jure exclusion from the public, political process. As such, Ely's perspective on sex discrimination exemplifies what Professor MacKinnon describes as a male point of view.

> The law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a

cuses on society's role in creating subordination. Second, it focuses on the way in which this subordination affects, or has affected, groups of people.[16] It is more invidious for women or blacks to be treated worse than white men than for men or whites to be treated worse than black women under this perspective, because of the differing histories and contexts of subordination faced by these groups.[17] Anti-subordination pro-

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gender, . . . through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying or de jure prohibiting its excesses when necessary to its normalization. Substantively, the way the male point of view frames an experience is the way it is framed by state policy . . . . As male is the implicit reference for human, maleness will be the measure of equality in sex discrimination law.

MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, 8 Signs 635, 644 (1983) (footnote omitted).

Thus, the central question, from a woman's perspective, is whether women experience coercion and powerlessness in their relationships with men. Ely does not ask this question in his analysis of the historical powerlessness of women in the political sphere. By contrast, this Article assumes that an examination of women's historical powerlessness within both the private and public spheres reveals that women are an oppressed group within our society.

[16] Professor Freeman forcefully articulates the necessity of a group-based analysis:

> The curious ideological phenomenon is that color blindness has become an abstraction that has taken on a life of its own, one that can turn around to disappoint the hopes of the very people on whose behalf it arose initially. Why should color blindness be an end in itself, a reference point against which to test questions of racial discrimination? It has become a way of abstracting the American black experience out of its own historical setting to the point where all ethnics become fungible under the pressure of color blindness. I don't think all ethnics are fungible; I think people have had very different experiences, and that the ideology of fungibility is part of the process of refusing to deal with the concreteness of black experience.

Freeman, School Desegregation Law: Promise, Contradiction, Rationalization, in Shades of Brown, supra note 15, at 77; see also L. Tribe, American Constitutional Law § 16-15, at 1-22 (1978) ("[J]udicial rejection of the 'separate but equal' talisman seems to have been accompanied by a potentially troublesome lack of sympathy for racial separateness as a possible expression of group solidarity." (footnotes omitted)).

[17] Anti-subordination advocates argue that legal rules can be used affirmatively as a means of ending historical patterns of patriarchy and white supremacy. Adrienne Rich, the feminist poet and theorist, defines "patriarchy" in terms of subordination: "[A]ny kind of organization in which males hold dominant power and determine which part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms." A. Rich, On Lies, Secrets, and Silence 78 (1979).

Similarly, Professor Bell has written of the subordination of racial minorities in terms of exclusion from the process of exercising power. As Bell argues, even the implementation of equal protection remedies has thus far been marked by such exclusion.

> The central issue in remedying past discrimination commonly has been conceived in the following terms: "Conceding that blacks have been harmed by slavery, or segregation, or discrimination, which groups of whites should pay the price or suffer the disadvantage that may be incurred in implementing a policy nominally directed at rectifying that harm?" This question, which focuses on the cost to whites of racial remedies rather than on the necessity of relief for minorities, obviously has been framed by whites for discussion with other whites. Their attitude is not unlike that of parents who, in the old strict-upbringing days, might have hushed a protesting offspring with a curt, "Keep quiet. We are talking about you, not to you."

ponents therefore advocate the use of race- or sex-specific policies, such as affirmative action, when those policies redress the subordination of racial minorities or women.[18]

The courts have struggled with the choice between the anti-differentiation and anti-subordination perspectives. The most obvious sources of this tension have been the affirmative action cases, where the courts have grappled with the issue of whether the principle of anti-differentiation should be compromised by accomodation of race- or sex-specific policies that are instituted to overcome a prior history of subordination of racial minorities or women. Affirmative action, however, is not the only source of this tension. This tension is also overt in the difference between the courts' treatment of race and sex discrimination cases, the difference between strict scrutiny and intermediate scrutiny under constitutional equal protection doctrine, and the difference between the courts' treatment of statutory and constitutional claims of race or sex discrimination. More broadly, the two principles offer differing perspectives on all equal protection doctrine, and have differing implications at both stages of the typical equal protection case: at the stage of establishing a prima facie case[19] and at the stage of justifying discriminatory policies or actions.[20]

Bell, Bakke, supra note 5, at 3-4.

[18] In general, this Article assumes that the anti-subordination perspective should be premised on an analysis of whether women and minorities, the affected groups, perceive that the particular program redresses subordination, and not whether the governmental entity intended it to do so. However, there may be situations in which the subordinating motivations of the governmental entity essentially undo the otherwise anti-subordinating effects of the program. For example, if a law school instituted an affirmative action program to increase minority enrollment, and publicly announced that such a program was necessary because black people are inherently unable to meet the necessary qualifications for law school admissions, one would have to look at the entire context and conclude that the program did not redress subordination. Part of that context would be the underlying motivation. The same affirmative action program at another institution, without those invidious public statements, could be seen as redressing subordination. Thus, to the extent that the motivations of a legislature or institution may affect the results of the program, the end result of this Article's analysis in a given case may be compatible with, although not determined by, the results of a motivational analysis. Legislative motivation is not addressed in depth in this Article because it would seem to be the rare case where the legislature had a subordinating purpose yet the results of the legislation helped alleviate subordination. The cases where such contrasting motivations exist often involve old statutes where it may no longer be relevant what the legislature initially intended, so long as the present effects of the legislation alleviate subordination. See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974) (property tax exemption for widows). The harder cases are those in which the original subordinating intent may also be the current legislature's intent. See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding statutory rape law); see also Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387, 402-04 (1984) (critique of legislature's intent in enacting statutory rape laws). But even in these harder cases, the inquiry should be how the current legislature's invidious intent impacts on women's lives. If it does not further their subordination, motivation could be ignored.

[19] See text accompanying notes 106-25 infra.

[20] See text accompanying notes 126-201 infra.

Although much of the scholarship on equal protection doctrine assumes that the anti-differentiation principle is justifiably the dominant perspective,[21] a comparison of race and sex cases,[22] as well as of constitutional and statutory cases,[23] reveals that the anti-subordination principle better explains both much of the law and the aversion we feel to race and sex discrimination.[24]

I make this argument from a non-originalist perspective under which I look to the text and history of the Constitution for a statement of

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[21] See notes 5-11 supra.

[22] See text accompanying notes 60-98, 204-48 infra.

[23] See text accompanying notes 51-59, 99-105 infra. This statutory/constitutional law comparison does not consider the differences between the congressional "intent" underlying each of these perspectives, because I do not believe that intent analyses should determine the answers to difficult issues like the meaning of the concept of equal protection. However, to the extent that an intent analysis is useful, it is probably more useful in interpreting recent statutory material, such as the Civil Rights Act of 1964, than older constitutional material like the fourteenth amendment. An examination of the legislative history of the Civil Rights Act of 1964 does reveal a pervasive concern for remedying the historical subordination of black people. See, e.g., Bureau of Nat'l Aff., supra note 1, at app. 103-362; U.S. Equal Employment Opportunity Comm'n, Legislative History of Titles VII and IX of Civil Rights Act of 1964 (n.d.). The same legislative history reflects virtually no concern about the subordination of women. In fact, the prohibition against sex discrimination was added to Title VII of the Act as an unfriendly amendment to kill the bill. See 110 Cong. Rec. 2577-84 (1964) (noting that prohibition was adopted by a vote of 168-133). The history of the fourteenth amendment is similar, with a focus on remedying the subordination of blacks to the exclusion of any consideration of the subordination of other groups. See, e.g., The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) ("We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of the [fourteenth amendment].").

[24] In arguing that the anti-subordination principle better explains the appropriate framework for equal protection analysis, I do not discount the importance and value of an individual-rights analysis. I recognize that race- and sex-specific policies can have a very powerful impact on equal protection by virtue of their intrinsic differentiation on the basis of immutable characteristics. But this Article argues that the courts have overemphasized the importance of individual rights to the detriment of a group-based perspective. The anti-subordination perspective that is articulated in this Article melds together individual-rights and group-based perspectives; thus, the anti-subordination perspective can be seen as a group-based articulation of individual rights. For other examples of my attempt to combine group-based and individual-rights arguments, see Colker, Published Consentless Sexual Portrayals: A Proposed Framework for Analysis, 35 Buffalo L. Rev. 39 (1986); Colker, Pornography and Privacy: Towards the Development of a Group-Based Theory for Sex-Based Intrusions of Privacy, 1 Law & Inequality 191 (1983).

The argument that the anti-subordination principle is crucial to equal protection doctrine is premised on the recognition that women and blacks have not achieved economic or political parity in the United States. The following figures show that the income gap between blacks and whites, and women and men, is still quite large, and not improving.

explicit principles as well as fundamental aspirations.[25] Through such an inquiry, I determine that the anti-subordination perspective is consistent with the history of the equal protection clause[26] and reflects a living aspiration that will help us move towards a world of equality. Historically, the equal protection principle developed to remedy a history of subordination against a particular group in society, blacks. Aspirationally, it reminds us that no group should remain subordinated in our society and that we should therefore take seriously the claims of women and of other discrete minorities that they have been subjected to pervasive discrimination in our society.

The anti-differentiation principle, in contrast, does a disservice to this history and fundamental aspiration by asserting that discrimination against whites is as problematic as discrimination against blacks.[27] We

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MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS (IN DOLLARS)

	1970	1978	1984
All Workers	130	227	326
White	134	232	339
Male	157	279	403
Female	95	167	264
Black and Other	99	186	265
Male	113	218	304
Female	81	158	242

Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 424, Table No. 704 (101st ed. 1980); id. at 419, Table No. 704 (106th ed. 1986).

Although I recognize that there may come a day when blacks and women achieve full equality, and therefore will no longer need the safeguards of an anti-subordination principle, we are a long way from that day.

[25] For an excellent discussion of the merits of the non-originalist perspective, see M. Perry, Morality, Politics, and Law: A Bicentennial Essay, ch. 6 (forthcoming 1988).

[26] From a statutory perspective, I would similarly argue that the principle of anti-subordination is embodied in the history of the civil rights struggle and the legislation that was enacted as a response to that struggle. The Supreme Court's recent decision in Johnson v. Transportation Agency, 107 S. Ct. 144 (1987), acknowledges the embodiment of the anti-subordination principle in Title VII. Id. at 1456-57.

[27] This emphasis on preventing differentiation, with minimal consideration to subordination, is a relatively recent development. In the leading article on equal protection under the fourteenth amendment, Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949), and in the subsequent book, J. tenBroek, Equal Under Law (1965), the authors concluded that the phrase "equal" was of secondary importance to the phrase "protection" in the phrase "equal protection" within the fourteenth amendment. They argued that the word "full" could have easily been used instead of the word "equal," since the purpose of the amendment was to provide protection of the laws to all men. Tussman & tenBroek, supra at 237. Under their interpretation, the fourteenth amendment embodies the principle of anti-subordination—having as its highest purpose the provision of full citizenship to those previously denied.

Nevertheless, by 1976, in another influential article, Professor Fiss lamented that the prevailing view of the fourteenth amendment was that it only required "color-blindness." Fiss, supra note 15, at 119-20 ("The overarching obligation is to treat similar persons similarly,

have not decided, as a nation, that all distinctions are invidious. We permit distinctions on the basis of intelligence or ability. We only prohibit distinctions that we have good reason to believe are biased or irrational,[28] and it is group-based experiences that primarily inform us as to which kinds of distinctions are biased or irrational. Thus, the anti-subordination principle, by recognizing and drawing on the historical subordination of blacks and women, offers a substantive explanation for why certain distinctions are subjected to closer scrutiny.[29]

Even if the reader does not accept my assertion that the anti-subordination principle is more faithful to our constitutional tradition and our civil rights struggle, I believe that the reader can conclude that the anti-subordination principle is needed for pragmatic reasons. It is simply a more flexible doctrine that permits the courts or employers to use race- or sex-specific remedies in some situations that call out for redress of prior discrimination. It does not absolutely tie their hands by forbidding the use of such remedies. I believe that courts and employers must be able to use race- or sex-specific remedies because history demonstrates the difficulty of achieving true equality through race- and sex-neutral remedies. These pragmatic arguments will be explored throughout the Article as I trace the history of race and sex discrimination doctrine and the difficulties that the courts have had in fashioning effective remedies.

In this Article, I argue that the courts have made their choices between the anti-differentiation and anti-subordination perspectives without a sound theoretical basis. The anti-differentiation perspective developed pragmatically as a means to redressing subordination, rather than as a theoretical response to the core problem with race or sex discrimination—differentiation or subordination. Historically, differentiation has been a powerful tool in perpetuating the subordination of minorities and women through segregation and exclusion. In the early

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declaring certain individual characteristics—such as color—irrelevant.") Highlighting this general overemphasis on anti-differentiation, Fiss argued for the need to consider group-based subordination. See id. at 123-24; note 5 supra.

[28] Professor Perry describes this case law as asserting that distinctions should not be made on "morally irrelevant" bases. See Perry, Modern Equal Protection: A Conceptualizaton and Appraisal, 79 Colum. L. Rev. 1023, 1065-67 (1979).

[29] Professor Sunstein has engaged in a similar inquiry and has reached a similar conclusion. He has characterized the fundamental constitutional aspiration as an aspiration to overcome "naked preferences"—to prevent "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1689 (1984). Professor Sunstein uses the naked preferences doctrine to explain many constitutional provisions. In contrast, I am using the anti-subordination principle only to explain the equal protection clause. The anti-subordination principle could therefore be seen as a more specific formulation of Sunstein's naked preference doctrine—it translates what "naked preferences" means in the equal protection context, i.e., subordination.

equal protection cases, the principle of anti-differentiation was useful to abolish racial segregation and other practices that excluded blacks.[30] Accordingly, the courts may not have seen the need to choose between the anti-differentiation and anti-subordination perspectives; they could describe the discrimination under either framework. The courts may therefore have uttered global assertions of anti-differentiation such as "separate can never be equal" when what they meant was "enforced segregation of blacks prevents their attainment of equality." I examine some of these early cases and show that the Supreme Court's primary concern was anti-subordination, despite some misleading statements about anti-differentiation. And I argue that that principle once again dominates the courts' analysis of equal protection doctrine.

The Court's recent affirmative action cases provide us with hope that the Court is rediscovering the value of the principle of anti-subordination.[31] These cases have shown that differentiation can be an equally powerful tool for the redress of subordination. However, the Court has not yet examined how the principle of anti-differentiation continues to limit much of the Court's equal protection work outside the area of affirmative action. In this Article, I argue that the principle of anti-subordination should be more firmly embedded in all of equal protection doctrine.

Accordingly, the framework I propose brings the principle of anti-subordination to the forefront of equal protection doctrine. The framework retains the bilevel inquiry that occurs in each equal protection lawsuit: the examination of the plaintiff's prima facie case, and the analysis of the defendant's proffered justification for the challenged policy or action.[32] Yet the proposed framework reformulates the substance of each stage of the inquiry. First, the plaintiff would no longer be required to show the discriminatory intent behind a neutral policy or be able to establish a prima facie case of discrimination simply by asserting that a policy or action facially differentiates. Instead, every plaintiff would have to establish that the policy or action had a disparate impact on members

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[30] See text accompanying notes 70-75 infra.

[31] See Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); United States v. Paradise, 107 S. Ct. 1053 (1987).

[32] The existing equal protection framework was taken, in large part, from the leading article, Tussman & tenBroek, supra note 27. In addition to the two stages discussed in this Article, a third stage exists in some cases, in which the plaintiff tries to show that the defendant's articulated justification is not, in fact, the real reason for its actions, and instead, is a pretext for discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1972) (Title VII case). This step primarily occurs in cases in which the defendant has used a race- or sex-neutral policy, and is therefore not of major concern in the context of this Article, which focuses on the use of race- or sex-specific policies.

of plaintiff's race or sex.[33] This reformulation elevates anti-subordination over anti-differentiation in two ways: first, by emphasizing the effect of policies or actions on groups rather than individuals, and second, by eliminating the need to prove discriminatory motivation. Under this proposed approach, if the plaintiff could not show disparate impact a court would uphold a race- or sex-specific policy or action without ever getting to the stage of justification. By valuing impact over differentiation at the prima facie case stage, the framework ensures that only policies or actions that *might* be subordinating would reach the stage of justification.

In its second phase, the proposed approach would focus the justification inquiry on the principle of anti-subordination rather than on nebulous constructs of strict or intermediate scrutiny, which leave courts uncertain about what normative principles underlie the level of scrutiny.[34] Only a goal of anti-subordination would justify a race- or sex-specific policy or action; no other justification would be permitted under the new framework. Courts would be unable to weaken the level of scrutiny to permit other kinds of justifications.[35]

Thus, under the equal protection framework proposed in this Article, it would be permissible for a state actor to use facially differentiating policies to *redress* subordination; it would not be permissible for a state actor to use facially differentiating policies that *perpetuate* subordination. Indeed, the essential inquiry in any equal protection case would be how differentiating policies or actions connect to subordination, not whether policies are phrased in race- or sex-specific terms. The courts and private parties should be able to implement race- and sex-specific policies where they are best suited to the task of remedying subordination.

In order to provide a context for the proposed framework's reformulation, Part I reviews the evolution of equal protection jurisprudence in both the race and sex areas. Part II then examines more closely the courts' application of the principles of anti-differentiation and anti-subordination at the prima facie case stage. Part III, the core of this Article, discusses the way in which courts have applied, and should apply, these principles at the justification stage.[36] The discussion in Part III addresses the stage of justification generally, and then focuses on cases challenging discrimination in education, because these cases best illustrate the courts' inconsistent treatment of race and sex cases. Part IV offers an expanded presentation and application of this Article's proposed new framework for analyzing equal protection cases.

This Article enters the debate at a time when equal protection juris-

[33] See text accompanying notes 111-22 infra.
[34] See text accompanying notes 60-98 infra.
[35] See text accompanying notes 91-105 infra.
[36] See text accompanying notes 126-248 infra.

prudence is at a crossroads. Affirmative action programs, the embodiment of the anti-subordination philosophy, are under continued attack, but the Court has recently breathed new life into such programs.[37] The Reagan Administration's efforts to impose its own extreme anti-differentiation perspective on the courts have been strongly rebuffed.[38] This Article builds on these recent victories by expanding the use of the anti-subordination principle beyond the affirmative action cases, to all equal protection claims. Such expansion is necessary to prod the courts in a direction that better serves the people that the equal protection clause should protect.

I

THE EVOLUTION OF EQUAL PROTECTION PRINCIPLES IN THE RACE AND SEX CASES

Since the beginning of the 1950s,[39] many black plaintiffs have

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[37] See Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); United States v. Paradise, 107 S. Ct. 1053 (1987).

[38] This perspective has been most visible within the United States Department of Justice. In its opposition to affirmative action programs, the Reagan Justice Department has argued that race- and sex-specific goals and quotas unconstitutionally discriminate against white men. See, e.g., *Paradise*, 107 S. Ct. at 1064 (United States opposing race conscious relief in case in which it had earlier intervened as party plaintiff). The recent affirmative action decisions have rejected the Administration's position. See id.; *Johnson*, 107 S. Ct. at 1457; Local 28, Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n, 106 S. Ct. 3019 (1986); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986).

Yet, the Reagan Administration's pure anti-differentiation perspective has found expression in other ways. During my tenure with the Civil Rights Division of the Justice Department, 1981-1985, I observed that the Division shifted its emphasis from disparate impact claims to different treatment claims, especially in the employment and housing areas. This shift was most obvious in the latter area, because the Department began to require its attorneys to allege proof of discriminatory intent in order to bring a housing discrimination case. Proof of intent is tantamount to proof of different treatment because it requires that the plaintiff identify a race- or sex-specific motivation as part of the prima facie case.

[39] The development of heightened scrutiny in race discrimination cases actually began long before the 1950s. See, e.g., Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying "most rigid scrutiny" yet upholding internment of Japanese-Americans during Second World War); Nixon v. Herndon, 273 U.S. 536 (1927) (involving Texas statute forbidding participation of blacks in primary elections); Strauder v. West Virginia, 100 U.S. 303 (1879) (invalidating all white jury); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945) (involving blacks excluded from library training class).

One of the most important moments in the development of both heightened scrutiny and the anti-subordination principle came in United States v. Carolene Prods., 304 U.S. 144 (1938), a case outside the area of race discrimination. Under rational basis review, the Court upheld a federal statute prohibiting interstate shipment of "filled milk." Id. at 154. In his famous footnote, Justice Stone, writing for the majority, suggested that a more stringent standard of review might be appropriate in certain cases in which "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Id. at 152 n.4. For discussion of the development of this doctrine, see generally Cover, The Origins of Judicial

brought cases alleging violations of the right to equal protection on either statutory[40] or constitutional[41] grounds, in which they challenged race-specific policies or actions that excluded them from important educational, employment, and general societal opportunities.[42] These policies and actions were invalid from both anti-differentiation and anti-subordination perspectives because they explicitly differentiated on the basis of race and subordinated blacks. Congress responded with major civil rights legislation that made such race-specific policies or actions unlawful in the areas of public accomodations,[43] federally financed programs or activities,[44] voting,[45] housing,[46] and employment.[47]

As the case law developed, courts had to confront two crucial issues. First, they had to determine whether evidence of a race-specific policy,

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Activism in the Protection of Minorities, 91 Yale L.J. 1287 (1982) (discussing evolution of judicial role since Justice Stone's *Carolene Products* footnote); Dimond, Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds, 80 Mich. L. Rev. 462 (1982) (arguing that framers of equal protection clause intended it to be broadly interpreted). For views critical of the development of equal protection doctrine through judicial activism, see R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977) (arguing for more narrow interpretation of equal protection clause); A. Bickel, The Supreme Court and the Idea of Progress 116-73 (1970) (finding the Warren Court's school segregation and legislative reapportionment opinions to be guided by increasingly irrelevant social policy goals); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 31-34 (1959) (finding Brown v. Board of Education "unprincipled"); Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (rejecting need for a principle of equality).

[40] Several federal statutes prohibit discrimination on the basis of race or sex. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (1982); Title IX, 20 U.S.C. §§ 1681-1686 (1982).

[41] "Constitutional equal protection doctrine" refers to the doctrine used in race- or sex-based discrimination cases brought directly under the equal protection clause of the fourteenth amendment. This clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[42] The leading case is Brown v. Board of Education, 347 U.S. 483 (1954) (overturning separate but equal doctrine in context of racial segregation of schools); see also Palmer v. Thompson, 403 U.S. 217 (1971) (racially segregated public parks); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (racially segregated housing); Loving v. Virginia, 388 U.S. 1 (1967) (state statute prohibiting interracial marriage).

[43] Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201-07, 78 Stat. 245 (codified as amended at 42 U.S.C. §§ 2000a to -6 (1982)); see also Title III of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 301-304, 78 Stat. 246 (codified as amended at 42 U.S.C. §§ 2000b to -3 (1982)) (public facilities).

[44] Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 252-53 (codified as amended at 42 U.S.C. §§ 2000d to -6 (1982)); see also Title IV of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 401-409, 78 Stat. 246-49 (codified as amended at 42 U.S.C. §§ 2000c to -9 (1982)) (public education).

[45] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973) (1982 & Supp. II 1984)).

[46] Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-806, 82 Stat. 81-84 (codified as amended at 42 U.S.C. §§ 3601-3606 (1982)).

[47] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253-66 (codified as amended at 42 U.S.C. §§ 2000e to -17 (1982)).

action, or motivation—explicit "different treatment"[48]—is always required to establish a prima facie case of discrimination, or whether evidence of "disparate impact,"[49] alone, is sufficient. The second issue confronting the Court was the level of scrutiny to apply to the justifications proffered for the discrimination once a prima facie case had been proved.[50] Each issue will be treated in turn.

A. The Different Treatment/Disparate Impact Controversy

The method of proof issue first arose in cases brought under Title VII of the Civil Rights Act of 1964,[51] in which blacks challenged policies or actions phrased in race-neutral language that nonetheless had a disparate impact in excluding them from employment opportunities.[52] When

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[48] The different treatment method of proof can take one of two forms. The plaintiff may either prove discrimination by showing that the policy or action is phrased in race- or sex-specific language, see, e.g., Craig v. Boren, 429 U.S. 190 (1976) (state law prohibiting sale of beer to males under age of 21 and to females under age of 18 held unconstitutional); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (rule prohibiting women with pre-school age children from being hired violated Title VII of Civil Rights Act), or may prove that a policy or action is race- or sex-specific in practice, although stated in neutral terms. The leading case in the latter area under Title VII is McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in which a civil rights activist alleged that his discharge was racially motivated in violation of the statute. Although he was given racially neutral reasons for the discharge, he alleged that race was the real reason. The *McDonnell Douglas* Court developed a framework for making out a prima facie case under Title VII in such a situation. The framework gives plaintiffs the initial burden of showing:

> (1) that they belong to a protected class,
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> (2) that they applied for and were qualified for a job for which the employer was seeking applicants,
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> (3) that, despite their qualifications, they were rejected, and
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> (4) that, after they were rejected the position remained open and the employer continued to seek applicants of the complainant's qualifications.

Id. at 802.

[49] The disparate impact approach was first validated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Court struck down an intelligence test and high school diploma requirement for departmental transfers because such a requirement had a disparate impact on blacks. For further discussion of the disparate impact test, see Chamallas, Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle, 31 UCLA L. Rev. 305 (1983); Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36 (1977); Hsia, The Effects Test: New Directions, 17 Santa Clara L. Rev. 777 (1977); Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. Pa. L. Rev. 540 (1977); Wasserstrom, Racism, Sexism and Preferential Treatment: An Approach to the Topics, 24 UCLA L. Rev. 581 (1977); Note, To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine, 61 N.Y.U. L. Rev. 334 (1986) [hereinafter Note, Rethinking Equal Protection Doctrine]; Note, Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent, 93 Yale L.J. 111 (1983).

[50] See text accompanying notes 60-105 infra.

[51] 42 U.S.C. §§ 2000e to -17 (1982).

[52] See, e.g., *Griggs*, 401 U.S. at 424; Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (payment of poll tax required as condition for voting perpetuated prior overt exclusion

these challenges were successful, similar attacks were made on constitutional grounds. The Supreme Court ultimately resolved the different treatment/disparate impact controversy through an analysis of the pragmatic implications of each choice.[53] Although the Court allowed proof of either different treatment or disparate impact to establish a prima facie case in a Title VII suit, it later required that cases brought directly under the Constitution be proved with evidence of different treatment.[54] In order to establish a prima facie case under the equal protection clause itself, a plaintiff must always demonstrate that a defendant acted with a race- or sex-conscious motive, regardless of the impact that the defendant's facially neutral policy may have had on blacks or women.[55]

The Court's formulation of the permissible methods of proof in statutory and constitutional cases can be seen as a choice between the anti-subordination and anti-differentiation perspectives. The statutory method of proof embodies the anti-subordination approach because it does not require proof of individualized motivation and permits consideration of the group-based effects of an action.[56] By contrast, the constitutional method of proof embodies the anti-differentiation perspective. Nevertheless, neither the Supreme Court nor commentators have described the choice in those terms. The Court instead views the choice pragmatically and has declined to apply the disparate impact test to constitutional cases because of the effect such a decision would have on existing race- and sex-neutral policies that produce disparate impact.[57]

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of blacks from right to vote); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (plant racially segregated until 1962, with promotions and transfers thereafter conditioned on biased recommendations); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970) (company hired blacks only as city drivers prior to 1965, and then prohibited transfers to "white" job categories).

53 See text accompanying note 54 infra.

54 Compare *Griggs*, 401 U.S. at 432 (evidence of intent not required under Title VII) with Washington v. Davis, 426 U.S. 229 (1976) (evidence of intent required under Constitution).

55 *Davis*, 426 U.S. at 246 (disparate impact of employment test did not establish prima facie case of discrimination).

56 Under the statutory disparate impact method of proof, the sole proof presented is the group-based effect of the policy or action. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) ("[P]laintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.").

57 In *Davis*, 426 U.S. at 229, the Supreme Court justified its unwillingness to use the more lenient effects test established under Title VII with the following pragmatic statement:

> [Title VII requires that tests] be validated in terms of job performance in any one of several ways. . . . However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as this.
>
> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent

Anti-subordination advocates show similar pragmatism in strongly endorsing the use of the disparate impact method of proof in constitutional as well as statutory cases; they focus on the relative ease in pleading constitutional claims rather than on the greater theoretical consistency involved.[58] Even some anti-differentiation commentators have been willing to advocate the statutory disparate impact model, because they realize that the constitutional model places nearly impossible hurdles in front of the plaintiff.[59] Thus, pragmatic rather than theoretical concerns have determined both the courts' and commentators' perspective on this crucial issue.

B. Resolving the Level of Scrutiny

The second important issue confronting the Court arose in the next phase of analysis, the stage of justification. The Court had to determine what arguments by the defendant could be permitted to justify race- or sex-specific policies or actions, once the plaintiff had shown a prima facie case of discrimination. This issue first arose in the constitutional challenges to race-specific policies in higher education that allegedly subordinated blacks.[60]

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compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than to the more affluent white.

Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

Id. at 247-48. For further criticism of the Court's rationale for requiring proof of different treatment in constitutional cases, see Note, Rethinking Equal Protection Doctrine, supra note 49, at 349-51.

[58] See, e.g., Eisenberg, supra note 49, at 48-49; Hsia, supra note 49, at 790-803.

[59] For example, Professor Williams, who is an ardent anti-differentiation theorist, argues for the use of the statutory disparate impact model, seemingly unconcerned with how it deviates from a pure anti-differentiation perspective. She seems to favor this model because of its powerful ability to remedy structural inequalities. See Williams, Equality's Riddle, supra note 2, at 330-31.

[60] For an excellent description of the development of this case law, see R. Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1975). According to Kluger, in 1945 the South was spending twice as much to educate each white child as it was per black child.

> It was investing four times as much in white school plants, paying white teachers 30 percent higher, and virtually ignoring the critical logistics of transporting rural Negroes to their schoolhouses. In 1944, the seventeen segregating states spent a total of $42 million busing white children to their schools; on transporting colored children, they spent a little more than one million dollars. . . . [T]here was still no institution in the South where a Negro could pursue studies for a doctorate. Excluding Howard University, there was one accredited medical school in the South for Negroes, but twenty-nine for whites.

In the late 1940s, there were two practical routes to expansion of blacks' educational opportunities in higher education: to press for the opening of all-white universities to blacks, or to insist that the southern states build separate and truly equal facilities. In 1948, the Supreme Court held in *Sipuel v. Board of Regents*[61] that states could determine for themselves the best way to create these opportunities. Although the Court recognized that blacks were entitled to receive quality higher education, it permitted the state of Oklahoma to create a separate law school for blacks rather than admit a black plaintiff to a white law school.

Other states responded by opening institutions of higher education for blacks to avoid desegregating white institutions. The NAACP Legal Defense Fund (LDF) challenged that response because of the message of inferiority it sent to both blacks and whites about blacks' intellectual capabilities[62] and brought the case of *Sweatt v. Painter*[63] to argue more strongly than it had in *Sipuel* that the Supreme Court should overrule *Plessy v. Ferguson*[64] and rule that segregation had no place in education.

The Court's opinion in *Sweatt* acknowledged the link between separate education and subordination. For the first time, the Court recognized the subjective factors that caused the black institution to be inferior

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Id. at 256-57.

About one-fourth of the entire black population was functionally illiterate. Id. at 257 (citing Ambrose Caliver, senior specialist in Negro education in United States Office of Education). Although blacks had GI benefits to attend college, few spots were available for them in the nation's segregated facilities. Id. The few black colleges that existed were flooded with applications, most of which had to be rejected for lack of space. For example, the Howard Medical School accepted 70 out of 1,000 applicants and the law school accepted 50 out of 500 applicants. Id.

[61] 332 U.S. 631 (1948). The plaintiff, Ada Lois Sipuel, had applied to the University of Oklahoma Law School, the only law school in the state. She was rejected because Oklahoma law prohibited education of both races in the same facility. Sipuel v. Board of Regents, 199 Okla. 36, 40, 45, 180 P.2d 135, 139, 144 (1947). Oklahoma had established a program where it financed out-of-state law education for blacks rather than desegregate the white state law school. The Oklahoma Supreme Court held that it was not unconstitutional to defer the installation of a law school for blacks until the need for one was made clear. Id. at 40-41, 180 P.2d at 139-140. The United States Supreme Court handed down a unanimous, per curiam opinion obligating Oklahoma to provide the plaintiff with a legal education in conformity with the equal protection clause of the fourteenth amendment "as soon as it does for any other group." *Sipuel*, 332 U.S. at 633. The Oklahoma court then ordered the defendants to comply with the Supreme Court. *Sipuel*, 199 Okla. at 588, 190 P.2d at 438. The Oklahoma Board of Regents created a separate law school for blacks. The plaintiff sought a writ of mandamus in the Supreme Court, but the Court denied the motion, making a narrow finding that, on remand, the state trial court had complied with the Court's mandate by barring the state from raising as a defense the plaintiff's failure to demand a separate but equal legal education. Fisher v. Hurst, 333 U.S. 147, 150 (1948).

[62] R. Kluger, supra note 60, at 260.

[63] 339 U.S. 629 (1950).

[64] 163 U.S. 537 (1886). In *Plessy*, the Court had upheld the separate but equal doctrine by permitting Louisiana to have separate railway cars for blacks and whites.

to the white institution, and ordered a black student admitted to a school previously restricted to whites.[65] However, the Court refrained from overruling *Plessy*,[66] leaving plaintiffs to argue in individual cases that individual schools for blacks were unequal to their corresponding white schools.[67]

Faced with the prospect of arguing cases of unequal educational facilities one by one for the next half century, the LDF pushed for a stronger statement from the Court about the harm to blacks caused by segregation. Finally, in 1954, the Supreme Court held in *Brown v. Board of Education*[68] that racially separate education cannot be equal education.[69]

A superficial examination of *Brown* suggests that the Court was emphasizing the principle of anti-differentiation over the principle of anti-subordination in its ruling.[70] However, closer examination shows that the anti-subordination principle dominated the Court's analysis.[71] Post-*Brown* courts have focused on the strong anti-differentiation statement from the *Brown* Court, namely, that separate can never be equal,[72] and overlooked that Court's central concern for remedying the subordination of blacks.[73] Applying a "strict scrutiny" standard, post-*Brown* courts have permitted virtually no justifications for racially-differentiating laws or policies,[74] prompting Professor Gunther to describe strict scrutiny as

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65 *Sweatt*, 339 U.S. at 635.

66 Id. at 636.

67 Id.; see also Kluger, supra note 60, at 284. By emphasizing the subjective factors that made the two schools unequal, the Court opened the way for a recognition of the principle that separate cannot be equal.

68 347 U.S. 483 (1954).

69 Id. at 495.

70 See id. ("Separate educational facilities are inherently unequal.").

71 The Court adopted the following finding from one of the lower courts:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children .... A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the education and mental development of Negro children and to deprive them of some of the benefits that they would receive in a racial[ly] integrated school system.

Id. at 494. It is interesting to note that *Brown* viewed integration as beneficial only to black students; it did not consider the possibility that integration might benefit white students as well. In addition, the Court seemed to contemplate the desegregation only of white institutions; the desegregation of black institutions was left an open question. Both of these observations support the conclusion that the Court was using an anti-subordination approach.

72 Although the *Brown* Court ruled only that *Plessy* was inapplicable in the education context, decisions that followed made clear that "separate but equal" was unconstitutional in every context. See G. Gunther, supra note 12, at 639 & n.1 (1985).

73 See note 71 supra.

74 The kinds of justifications that courts have accepted have been influenced by the method of proof used to prove discrimination. Where the plaintiff uses the different treatment method of proof there has been a stronger presumption of invalidity at the justification stage than where the plaintiff uses the disparate impact method of proof. However, this presumption of

"fatal in fact."[75]

Yet, the strict standard of scrutiny did not survive importation to other, non-race-based claims of equal protection violation, such as claims of sex discrimination. In the early sex discrimination cases, male plaintiffs brought constitutional challenges to preferential policies for women,[76] and women challenged subordinating sex-specific policies.[77] After exploring various levels of scrutiny, the Court settled on approaching these cases with an "intermediate" level of scrutiny, under which some sex-specific policies or actions were invalidated, while others survived.[78]

Intermediate scrutiny, or "intensified rational basis scrutiny" has developed gradually in the sex discrimination context.[79] Before the advent of modern equal protection doctrine on sex-based classifications, courts were relatively unconcerned about the subordination of women. The courts easily accepted justifications for sex-specific policies or actions that served to perpetuate, rather than eliminate, the subordination of women to men. For example, in 1873, in *Bradwell v. Illinois*,[80] the Court

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invalidity has been especially strong in the race context: strict scrutiny has almost always rendered race-specific rules invalid. Gunther, The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

[75] Id. No one formulation of strict scrutiny exists. Compare Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J., joined by White, J.) ("[R]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.") with id. at 361-62 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) ("[O]ur review under the Fourteenth Amendment should be strict—not 'strict in theory and fatal in fact,' because it is stigma that causes fatality—but strict and searching nonetheless."). Justice Powell's formulation seems more purely to embody the anti-differentiation perspective than does the formulation suggested by Justices Brennan, White, Marshall, and Blackmun. The Court has also used modifications of the Powell formulation. In Palmore v. Sidoti, 466 U.S. 429 (1984), the Supreme Court stated that "to pass constitutional muster, [racial classifications] must be 'necessary . . . to the accomplishment' of their legitimate purpose." Id. at 432 (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)); see also Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (Burger, C.J., joined by White and Powell, JJ.) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."); id. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

[76] See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974) (male plaintiff challenged property tax exemption for women).

[77] See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (female plaintiff challenged statutory preference for male estate administrators).

[78] Thus, while in the race context the justification process has been virtually meaningless unless the plaintiff relies on the disparate impact method of proof, see note 74 supra, the justification stage is always important in the gender discrimination context. Under intermediate scrutiny, the defendant must prove that a sex-specific policy or action served an important objective and was substantially related to achieving that objective.

[79] See generally G. Gunther, supra note 12, at 642-69.

[80] 83 U.S. 130 (1873). The petitioner argued that the privileges and immunities clause of

upheld a rule against women practicing law. Justice Bradley, in his famous concurrence, justified this rule on the basis that "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender."[81] Indeed, until the 1940s, virtually all of the cases challenging sex-specific classifications involved such subordinating views of women.

In these early cases, the Court did not even apply an equal protection framework.[82] Hence, it upheld sex-based distinctions without inquiry into the problems of differentiation or subordination. It was not until the 1970s that the Court began to move toward intermediate scrutiny as a means to redress the subordination of women. In *Reed v. Reed*,[83] the Court purported to use rational basis scrutiny in striking down an Idaho statute that provided a mandatory preference for males over females in the selection of the administrators of estates, but the Court actually applied a heightened level of scrutiny.[84] Two years later, in *Frontiero v. Richardson*,[85] a plurality of the Court used heightened scrutiny to invalidate a statute that presumed that servicemen but not servicewomen were the major providers in households.[86] The plurality

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the fourteenth amendment, rather than the equal protection clause, provided her with the right to become a member of the Illinois bar. The majority rejected that argument, finding that the right to practice law is not guaranteed by the privileges and immunities clause.

[81] Id. at 141 (Bradley, J., concurring).

[82] For example, in *Bradwell* the plaintiff alleged a violation of the privileges and immunities clause of the fourteenth amendment. Id. at 138. In Muller v. Oregon, 208 U.S. 412 (1908), the plaintiff alleged a violation of the due process clause of the fourteenth amendment, under the rubric of substantive due process.

[83] 404 U.S. 71 (1971).

[84] A unanimous Court stated that the appropriate test was whether the classification was "reasonable, not arbitrary, and [rested] upon some ground of difference having a fair and substantial relation to the object of the legislation"—the traditional rational basis test. Id. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). However, the "fair and substantial relation" language in *Reed* acquired more significance than it had in prior cases. For example, in the earlier case of Goesaert v. Cleary, 335 U.S. 464 (1948), the Court upheld a statute that prohibited women from working as bartenders unless they were the wife or daughter of a bartender. The Court accepted the justification that the statute served the state interest of protecting society's morals, despite the strong suggestion that the real purpose of the statute was to protect the male monopoly on bartending. The Court accepted this justification under rational basis scrutiny, because it found that the statute was "not without a basis in reason." Id. at 467. By contrast, in *Reed*, the state offered the justifications that the sex-based rule would prevent intrafamily conflict, see 404 U.S. at 76-77, and, as a matter of administrative convenience, favor those who, on average, would have more financial experience. See Brief for Appellee at 12, *Reed*, 404 U.S. at 71, cited in Frontiero v. Richardson, 411 U.S. 677, 683 (1973). While these justifications were arguably as strong as those presented in *Goesaert*, the Court upheld the bartending restrictions in *Goesaert* and overturned the restrictions on estate administrators in *Reed*.

[85] 411 U.S. 677 (1973).

[86] The armed services had a rule providing married men with an extra stipend to support their families. Married women, by contrast, received this stipend only if they could establish

stated:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children . . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"—until adoption of the Nineteenth Amendment half a century later.[87]

The *Frontiero* Court used this history to justify the application of what it termed "strict judicial scrutiny."[88] Despite this label, the scrutiny employed by the *Frontiero* Court, like the scrutiny used in later sex discrimination cases, was not as probing as the scrutiny used in race discrimination cases.[89] The Court's decision in *Frontiero* exemplifies the development of this less probing model within modern sex-based equal protection doctrine. After justifying the use of heightened scrutiny, the Court considered justifications for the sex-specific policy, noting that the statutes in question were "not in any sense designed to rectify the effects of past discrimination against women."[90] The Court thus suggested that

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their husband's financial dependence upon them. Id. at 678. Wives were thus presumed to be dependent upon husbands who were in the military, but husbands were not presumed to be dependent on their military wives.

[87] Id. at 684 (footnotes omitted).

[88] Id. at 689.

[89] While the plurality opinion in *Frontiero* purported to use strict scrutiny to strike down a sex-based classification, the analysis was not as stringent as that previously used in the race context. Under a traditional strict scrutiny approach, the Court would not have closely analyzed a state objective unless that objective was arguably compelling. By contrast, in *Frontiero* the Court focused on whether the government did, in fact, save money by having an irrebuttable presumption of dependency for the spouses of men but not for the spouses of women. See 411 U.S. at 690. Since this purported justification only rose to the level of administrative convenience, it could easily have been dismissed even under the less rigid scrutiny used in *Reed*. Indeed, the Court relied heavily on the prior reasoning in *Reed*, see id. at 689-90, and was therefore really using a heightened rational basis level scrutiny, rather than the "strict scrutiny" it purported to employ. Today, the Court is playing fewer games of verbal gymnastics with the level of scrutiny. It admits that sex-based discrimination analysis has its own, "intermediate" level of scrutiny and seems to be fairly consistent in its description of that level of scrutiny. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-27 (1982).

[90] *Frontiero*, 411 U.S. at 698 n.22.

it was appropriate to consider the principle of anti-subordination in ruling on the constitutionality of a sex-specific rule.

Unfortunately, it soon became clear that anti-subordination was not the only justification for sex-specific policies that the Court was willing to accept. Later cases revealed that other justifications were also to be considered, justifications that reflected a weak anti-differentiation model without an anti-subordination foundation.

A year after *Frontiero*, the range of justifications for sex-specific policies or actions emerged more clearly in *Kahn v. Shevin*,[91] in which the Court used an explicitly lower level of scrutiny than that which it had purported to employ in *Frontiero*. In *Kahn*, a widower challenged a state property tax exemption that was available only to widows, blind persons, or totally and permanently disabled persons.[92] The Supreme Court upheld the statute using the *Reed* heightened rational basis test,[93] and its analysis provided the state with wide discretion in justifying sex-specific policies.[94]

Two years later, the Court's decision in *Craig v. Boren*[95] made clear that intermediate scrutiny was to be the standard of review in sex-discrimination cases.[96] Invalidating an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 and to females under 18, the Court linked the use of intermediate scrutiny to its ability to consider sex-specific justifications, but bypassed an anti-subordination analysis because Oklahoma did not suggest that "the age-sex differential was enacted to . . . compensat[e] for previous deprivations."[97]

These cases illustrate the general inconsistency on the Court's part in applying the principles of anti-differentiation and anti-subordination. In constructing the stage of justification, the Court developed a stronger anti-differentiation perspective in race cases than in sex cases by exhibiting less toleration of race-specific policies or actions than of sex-specific policies or actions.[98]

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91 416 U.S. 351 (1974).

92 Id. at 352.

93 See id. at 335; note 84 supra.

94 First, the *Kahn* Court examined empirical evidence that widows face financial difficulties. 416 U.S. at 353 nn.4-6. Second, it discussed the appropriate level of scrutiny. Id. at 355. After citing *Reed*, it analogized the statute to any state tax law and noted the wide discretion that states have in enacting tax statutes. It proceeded to apply the lenient rational basis standard for such legislation, and found the statute "well within" the appropriate limits. Id.

95 429 U.S. 190 (1976).

96 See id. at 197.

97 Id. at 198 n.6. For a discussion of how *Craig* would be analyzed under the framework proposed in this Article, see note 171 infra.

98 As was shown earlier, a similar inconsistency has emerged in the Court's construction of the framework for the prima facie case. The Court developed a stronger anti-differentiation perspective in constitutional cases (where it requires proof of "different treatment") than in

Mirroring, to some degree, these developments in the case law, Congress's actions have also reflected dissatisfaction with the anti-differentiation model in the area of sex discrimination. Although Congress enacted civil rights legislation that made some sex-specific policies or actions unlawful in the areas of federally financed education,[99] credit,[100] and employment,[101] the sloppiness of the constitutional sex-discrimination model has carried over to the statutory context. The statutory model of equal protection is riddled with exceptions that perpetuate women's subordination, the most egregious of which is that sex-specific employment discrimination claims under Title VII can be defended with arguments of "bona fide occupational qualification" (BFOQ).[102] Title VII contains the BFOQ exception for sex-specific policies, but not for race-specific policies, with the result that some sex-specific rules are allowed even though they have a discriminatory impact.[103] Similarly, Title IX of the Education Amendments of 1972 contains numerous sex-based exceptions to its antidiscrimination provisions.[104] Thus, like the intermediate standard of scrutiny in the Court's constitutional decisions,[105] this legislation created exceptions to the principle of anti-differentiation that do not exist in the racial area. While generally proceeding under the guiding principle of anti-differentiation, the Court and Congress have permitted many more

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statutory cases (where it permits proof of different treatment or disparate impact). See text accompanying notes 51-59 supra.

[99] Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373-75 (codified as amended at 20 U.S.C. §§ 1681-1686 (1982)).

[100] Equal Credit Opportunity Act, Pub. L. No. 93-495, tit. V, 22 Stat. 1521-24 (codified as amended at 14 U.S.C. §§ 1691-1691f (1982)).

[101] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716(c), 78 Stat. 253-66 (codified as amended at 42 U.S.C. §§ 2000e to -17 (1982)).

[102] Section 703(e) of Title VII permits sex-based discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." 42 U.S.C. § 2000e-2(e) (1982). This exception applies also to religion and national origin, but not to race. Id.

[103] See, e.g., Harriss v. Pan Am. World Airways, 649 F.2d 670 (9th Cir. 1980) (upholding mandatory leave rules for pregnant women); Backus v. Baptist Medical Centers, 510 F. Supp. 1191 (E.D. Ark. 1981) (upholding rule barring male nurses in hospital obstetrics and gynecology ward), vacated as moot, 671 F.2d 1100 (8th Cir. 1982). For further discussion of the effects of the BFOQ defense, see text accompanying notes 183-89 infra.

[104] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1982), prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. This nondiscrimination provision, however, does *not* apply to military institutions, public educational institutions with traditional and continuing single-sex admissions policies, social fraternities or sororities, voluntary youth service organizations, American Legion Boy or Girl conferences, father-son or mother-daughter activities at educational institutions, or awards in beauty pageants. Id. § 1681(a)(4)-(9).

[105] Although the labels "strict" and "intermediate" scrutiny are not used in the statutory context, the BFOQ exception to Title VII has a remarkably similar effect on the relative treatment of race and sex cases. See note 78 supra; text accompanying notes 183-89 infra.

justifications for sex-specific policies or actions than for racially differentiating policies or actions.

II

THE DEVELOPMENT AND APPLICATION OF THE ANTI-DIFFERENTIATION AND ANTI-SUBORDINATION PRINCIPLES IN THE PRIMA FACIE CASE STAGE

Courts do not consider all legislative differentiations presumptively invalid; instead, they generally defer to the right of a legislature to make distinctions when creating legislation.[106] Yet, the courts probe distinctions of race and sex more closely than they probe other distinctions.[107] The closer scrutiny of race and sex discrimination cases developed in response to a history of subordination of blacks and women,[108] not from a general hostility to differentiations.

Nevertheless, the courts have sometimes lost sight of this primary concern with anti-subordination when they have inquired into the lawfulness of race- or sex-based distinctions. As we have seen, the rules governing pleading of constitutional challenges to discriminatory laws reflect a policy choice of anti-differentiation over anti-subordination.[109] Under existing constitutional equal protection doctrine, a plaintiff may not establish a prima facie case of discrimination solely with evidence that a race- or sex-neutral policy or action had a disparate impact on a protected class of persons, but must instead offer proof of different treatment or invidious motivation. Under statutory equal protection doctrine, however, plaintiffs can establish a prima facie case either with evidence of different treatment or solely with evidence of disparate impact.[110] In the statutory setting, therefore, the courts have permitted the plaintiff to establish a prima facie case through evidence that the institution violated either the anti-differentiation principle or the anti-subordination principle.

In this section, I question the construction of the prima facie case under both the constitutional and statutory models. Like other commen-

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[106] See, e.g., Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (stating that challenged distinction "must be reasonable, not arbitrary, and must rest upon some ground of difference having fair and substantial relationship to the object of the legislation").

[107] For example, while courts do not generally invalidate legislation that creates distinctions in taxation based on a taxpayer's income, they do closely scrutinize legislation that creates distinctions in taxation based on a taxpayer's race or sex. See Kahn v. Shevin, 416 U.S. 351, 355, 356 n.10 (1974) (emphasizing leeway of states in enacting tax classifications).

[108] See text accompanying notes 39-47, 76-90 supra; see also Chafe, The American Woman (1972).

[109] See text accompanying notes 54-59 supra.

[110] See text accompanying notes 51-59 supra.

tators,[111] I criticize the courts for choosing the principle of anti-differentiation over the principle of anti-subordination in the constitutional cases. My criticism of the statutory cases, however, is novel. I argue that the courts should *not* be satisfied with a showing that either the principle of anti-differentiation or the principle of anti-subordination has been violated. Rather, they should always insist on evidence that the principle of anti-subordination has been violated. Evidence of different treatment should not be sufficient.

Consideration of the following hypothetical situation will facilitate an understanding of my argument:

> A city agency has had a policy for the last five years that all professional employees may have a month of paid sick leave each year and the nonprofessional staff may have two weeks of paid sick leave. An employee is not required to justify the use of this sick leave. However, an employee who is absent more than the allotted sick leave may be terminated.
>
> The composition of this agency is: professional employees: 5% black, 10% female; nonprofessional employees: 60% black, 90% female. Black women comprise 90% of the individuals who earn income at the bottom two pay scales of this employer.
>
> Over the last five years, the only employees to be terminated for violating this policy were black women. These women missed work for a variety of reasons, such as transportation, health, crime, housing and child care problems.
>
> Would (or should) black women be able to bring a successful claim for violation of equal protection? If the employer or a court recognized a problem at the workplace, would (or should) it be able to order a race- and sex-specific leave policy to overcome this problem?

Anti-differentiation advocates would prefer to use a different treatment analysis to describe the problem in this hypothetical and to develop proper solutions to it. However, as I will show, that analysis cannot resolve the underlying problem. Instead, an effective response requires a disparate impact analysis.

A. The Different Treatment Method of Proof

The different treatment approach requires black female plaintiffs to show that the defendant is treating them differently than it is treating similarly situated white or male workers. However, the black women in the hypothetical could not use this approach to challenge the policy because there are no similarly situated white or male workers who are being treated differently. This understanding of inequality is deficient because it permits the perpetuation of a system in which white men can

[111] See authorities cited in note 12 supra.

generally take more sick leave than black women because of their differing status within the workplace.[112] Hence, this understanding of inequality permits the perpetuation of the "horizontal" and "vertical" segregation of the workplace.[113] Yet, a pure anti-differentiation analysis would not even perceive that a violation of equal protection exists here.

If anti-differentiation proponents did perceive that a problem exists here, they would insist that the employer respond only with race- and sex-neutral policies. They argue that the different treatment approach is important in defining discrimination and the scope of appropriate remedies because it reduces the risk of perpetuating racial or sex-role stereotypes.[114] They believe that facially differentiating policies perpetuate

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[112] See generally Omolade, Black Single Mothers: The Real Deal, 1987 Wis. Women's L.J. (forthcoming 1987) (discussing economic and social inequities that have plagued black single mothers).

[113] See C. MacKinnon, supra note 6, at 9-13. "Horizontal" segregation describes how working women are employed in jobs that are mostly performed by women. Id. at 10-11. "Vertical" segregation describes how women are generally men's subordinates in the workplace. Id. at 12-13. For further discussion of these inequities, see Krieger & Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 Golden Gate U.L. Rev. 513, 518-22 (1973). Krieger and Cooney argue that for women to have equal employment opportunities, reasonable leave and job protection must be granted to pregnant women. Since only women become pregnant, leave policies that draw no distinctions between the sexes will have an adverse and disparate impact on women who must take some time off from work as a result of pregnancy-related physical disability.

[114] See, e.g., Williams, Equality's Riddle, supra note 2, at 329-30. Yet if the concern is sex-role stereotypes, it is hard to see how one approach avoids the problem more than the other. With respect to the issues of pregnancy leave policies, which Williams addresses, the success of both approaches depends upon the ability to show that views about pregnant workers are not stereotypical, that these workers do miss more work than other employees. The potential stereotypes that might be reinforced under the anti-differentiation model become obvious if one considers the merits of the legislation that Williams proposes to deal with the disproportionate impact that a no-leave policy can have against women workers. Williams endorses legislation that would permit all workers to take leave to care for family members. See id. at 379. She considers such a statute preferable to a sex-specific statute that only requires leave for pregnant workers, such as the California statute recently upheld in California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987), because the former would not single out women for "special treatment" in the workplace, and for primary responsibility in taking care of family members. See Williams, Equality's Riddle, supra note 2, at 371, 377.

Nevertheless, this proposed statute would further other forms of traditional stereotyping. For example, it assumes that it is more valid for persons to take care of family members than to take care of other kinds of people. In doing so, it reinforces the societal benefits that go to the traditional family unit. A gay man who might want to take leave from work to care for a lover or friend who is suffering from Acquired Immune Deficiency Syndrome (AIDS) would not be covered. A member of an unmarried couple who has agreed to care jointly for a child, but who is not legally one of the child's parents, would be unable to do so. Moreover, and most important for sex-role stereotyping, it might place increased burdens on women to provide free care for family members because they no longer would be able to argue that their employer would not give them leave time. Because women have historically had to shoulder the burden of caring for children and elderly parents, there is no reason to believe that they would not continue to share disproportionately in that burden under the anti-differentiation proposal.

racial and sex-role stereotypes by using race or sex as an inaccurate proxy for sociological conditions that could be defined in race- and sex-neutral terms.[115] They therefore would not allow the employer to "correct" the disparate impact on black women through the use of a race- or sex-specific policy. Assuming that their argument is correct, can we be sure that their approach will avoid perpetuating stereotypes?[116] Moreover, at what cost do we avoid perpetuating these stereotypes?

The cost of avoiding race- and sex-specific remedies is too high. A race- and sex-specific remedy may be the most effective because it makes it difficult for an uncooperative defendant to circumvent the court's order.[117] The history of court-ordered desegregation illustrates this point strongly. After the *Brown* decision, many courts ordered desegregation of public facilities, but many did not prescribe the way in which the defendants should achieve desegregation. Some defendants responded by closing the segregated public facility to avoid having to desegregate it.[118] Rather than recognize that race-specific remedies were necessary to insure that these facilities would be open to blacks, the Supreme Court avoided taking a strong position on this issue.[119] The Court failed to recognize that closing these facilities would have a disparate impact on blacks who would not have access to the newly opened private facilities.

Similarly, in the hypothetical, if the court ordered the defendant to provide the same leave to all workers to eliminate the impact of the two-

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115 See Williams, Equality's Riddle, supra note 2, at 326.

116 See note 114 supra.

117 See United States v. Paradise, 107 S. Ct. 1053, 1066 (1987) ("The [race-conscious] relief at issue was imposed on a defendant with a consistent history of resistance to the District Court's orders and only *after* the Department failed to live up to its court-approved commitments." (emphasis in original)).

118 See, e.g., Palmer v. Thompson, 403 U.S. 217 (1971) (public pool); Evans v. Abney, 396 U.S. 435 (1970) (public park); Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961) (public schools).

119 In *Bush*, 365 U.S. at 569, the Supreme Court affirmed without opinion the district court's invalidation of the state's action. The *Bush* case proved to have limited precedential value outside the public education context, however, because ten years later, in *Palmer*, 403 U.S. at 217, the Supreme Court affirmed the district court decision permitting the defendants to close a segregated public pool rather than desegregate it, id. at 227. In reaching its decision, the majority rejected the dissent's position that the pool closing operated unequally on whites and blacks. Id. at 220 n.5. The Court distinguished the *Bush* case as involving public education, an especially important state function. Id. at 221 n.6. For further criticism of *Palmer*, see Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95; The Supreme Court, 1970 Term—Highlights of the Term, 85 Harv. L. Rev. 40, 86-95 (1971); Note, Closing Pools To Avoid Desegregation: Treading Water, 58 Geo. L.J. 1220 (1970); Note, Constitutional Law—Civil Rights—Closing Municipal Swimming Pools in Response to Desegregation Order Does Not Violate Negro Plaintiffs' Thirteenth and Fourteenth Amendment Rights, 16 Wayne L. Rev. 1434 (1970). These commentators generally criticize *Palmer* because it did not fully consider the evidence of invidious motive. They do not discuss the issue of the limitations of race-neutral relief.

tier leave policy on black women, the employer could respond with a no-leave policy for all workers. Although this race- and sex-neutral policy would meet the court's requirements, it would have an even greater disparate impact on the black female workers, who would remain unable to afford good health care, child care, or transportation. Thus, race- and sex-neutral remedies may leave the underlying problem unresolved.

In addition, the anti-differentiation strategy may not always achieve its intended results. The fact that a plaintiff has argued from an anti-differentiation perspective does not mean that the courts will refrain from imposing a race- or sex-specific remedy. In the hypothetical, even if it were possible for a plaintiff to win a different treatment case and seek a prospective race- and sex-neutral prospective remedy, the court would be faced with many difficult choices. It could choose the plaintiff's preferred remedy of providing everyone with four weeks of leave time. This remedy would be race- and sex-neutral. Or it could search for a middle ground that would be reasonable in cost and tailored to remedy the underlying problem. The court might search for a remedy that would define all the factors that are causing black women to miss work disproportionately—housing, transportation, health care, child care, and the like. However, it might decide that it is not feasible to define all these factors in a way that would not lead to abuse of a new leave policy by other workers. Hence, it might opt for a race- and sex-specific remedy for black women. What will anti-differentiation proponents do at that point? Might they argue for no remedy at all rather than a race- or sex-specific remedy? No remedy at all would be an unfortunate development after a court has found that discrimination exists. Thus, employment of the different treatment approach does not necessarily avoid the possibility of race- or sex-specific policies or actions because the court may conclude that those are the best practical remedies.[120]

The problem underlying these deficiencies in the different treatment approach is the law's definition of "discrimination." A prima facie case of discrimination can stand or fall solely on the basis of the language used in expressing a rule. By creating a distinction between "women" and "men," an employer is presumed to have discriminated on the basis of sex. Conversely, by creating facially neutral classes such as "veterans" and "nonveterans" rather than sex-specific distinctions like "men" and "women," governmental entities are able to avoid a finding of

[120] This observation has been validated recently in the context of attempts by the United States Justice Department to prevent imposition of race- or sex-specific remedies in cases that were brought by the United States during previous administrations. See, e.g., United States v. City of Buffalo, 609 F. Supp. 1252 (W.D.N.Y. 1985) (district court refused to remove existing race- and sex-specific goals and timetables in suit originally brought by Justice Department).

discrimination.[121]

Prima facie discrimination need not be defined so superficially. Under the present framework, the law allows rulemakers to hide an invidious purpose behind facial neutrality. It would be more intellectually honest, and useful, for rules to say what they mean, rather than be drafted to meet the test of anti-differentiation. The real issue should be a policy's contribution to, or redress of, subordination, not the way in which it is phrased.

I therefore suggest that courts require *some* evidence of subordination in the presentation of the prima facie case.[122] Evidence of differentiation should not be sufficient. One kind of evidence that could sufficiently establish subordination for the purpose of the prima facie case is evidence of disparate impact. Such evidence would indicate that the plaintiff is being treated differently because of her membership in a group, suggesting that group-based inequality is present within that institution. By arguing that the courts require some evidence of subordination at the prima facie case stage, I am not suggesting that evidence of differentiation is irrelevant to a showing of subordination or that courts ignore the implications of remedial differentiation. Rather, I argue that courts must specifically ask how differentiation influences subordination. Differentiation may contribute to subordination, or it may redress it as in the affirmative action setting. Courts should stop assuming, as anti-differentiation proponents would have them assume, that differentiation can *only* contribute to subordination and can never redress it.

In general, these criticisms reflect the failure of anti-differentiation advocates to grasp fully both the practical and theoretical limitations of the different treatment method of proof. This method of proof can

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[121] See Personnel Adm'rs of Mass. v. Feeney, 442 U.S. 256 (1979).

[122] Professor MacKinnon has also recognized the necessity of establishing evidence of subordination in equal protection cases. In a conversation with me, she argued for an Equal Rights Amendment that would make the subordination of women to men unconstitutional. This amendment would shift the debate about equal protection to an inquiry into what practices are subordinating rather than simply differentiating. Under this approach, one might argue that it is subordinating to women in the workplace to be subjected to the sexual advances of male supervisors, because of men's power over women in the workplace, but not subordinating to men to have to respond to the sexual advances of female subordinates. See C. MacKinnon, supra note 6, at 1-7.

In MacKinnon's words, the "inequality" or anti-subordination approach

> understands the sexes to be not simply socially differentiated but socially unequal. In this broader view, all practices which subordinate women to men are prohibited. The differences approach, in its sensitivity to disparity and similarity, can be a useful corrective to sexism; both women and men can be damaged by sexism, although usually it is women who are. The inequality approach, by contrast, sees women's situation as a structural problem of enforced inferiority that needs to be radically altered.

Id. at 4-5. This Article extends MacKinnon's observations to race cases and seeks to fit the anti-subordination perspective within the analysis that occurs at the prima facie case stage.

neither challenge structural barriers to equality adequately nor facilitate the redress of group-based subordination. While the disparate impact theory may be more successful, much of its success depends, as the discussion that follows will show, on the ability of its proponents to formulate and advance race- and sex-specific policies that truly redress subordination.

B. Disparate Impact Method of Proof

The disparate impact approach would be more successful in combating the structural barriers to equality illustrated by the hypothetical.[123] It does not require proof of individualized discriminatory motivation and would therefore permit consideration of a group-based claim by the black female plaintiffs in the hypothetical. These plaintiffs could aggregate evidence to show that the leave policy has a disparate impact on their employment opportunities within the workplace. Accordingly, they could challenge some of the structural inequalities of the workplace exemplified by the sick-leave policy. Finally, they could argue for race- or sex-specific prospective relief.

Despite these advantages, the existing use of the disparate impact model in statutory litigation is too limited in two respects. First, the statutory model permits courts to probe only the disparate impact of a policy within an employer's workplace over a limited time period.[124] Thus, in the hypothetical, an employer would disclaim responsibility for the factors causing black women to miss work and argue that it should not bear the costs of remedying socially-imposed inequalities. If litigants are to be successful in using law to remedy socially-imposed inequalities, the concept of disparate impact must be broadened to include a societal perspective.

Second, the disparate impact model, as currently employed, is only available to the plaintiff to challenge the *detrimental* effects of a *neutral* policy.[125] The defendant cannot use its effects-oriented focus to argue for the possible *benefits* of race- or sex-specific rules. For example, what if the employer in the hypothetical noticed the disparate impact of its leave policy on black women and wanted to solve this problem? The employer would have to use a race- and sex-neutral approach, such as providing all employees with four weeks of paid sick leave, in order to avoid a challenge by white male plaintiffs under the different treatment method of proof. The employer would not be able to provide more sick leave only to the employees adversely affected by the current policy, black women,

123 See text accompanying notes 111-12 supra.

124 See Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977).

125 See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971).

because such a policy would be race- and sex-specific. Under the model proposed in this Article, defendants could use the disparate impact method of proof to prove that a race- and sex-specific policy is *not* discriminatory.

Of course, there are problems with an expanded disparate impact approach. First, in the context of a traditional equal protection challenge by a black or female plaintiff, it may not be fair to hold a defendant liable for socially-created inequities. Second, in the affirmative action context, institutions may needlessly choose race- and sex-specific remedies, and run the risk of perpetuating racial and sex role stereotypes, when a race- and sex-neutral remedy is available. For example, if the black women were missing work only due to child care responsibilities, then it might be best to use a remedy that would increase the leave available only for these responsibilities. Nevertheless, not all persons with child care responsibilities might be equally deserving of increased leave; some of these people may have enough financial resources to afford high quality child care. Although a generic leave policy for persons with child care responsibilities is preferable because it would avoid perpetuating race and sex role stereotypes, such a policy might be overinclusive. Thus, institutions need to consider carefully the advantages and disadvantages of race- and sex-specific policies and actions before imposing them.

III

THE DEVELOPMENT OF THE ANTI-DIFFERENTIATION PRINCIPLE AT THE STAGE OF JUSTIFICATION

Once a plaintiff establishes a prima facie case of discrimination, the defendant has the burden of justifying the discrimination. At this stage, commentators differ on whether the proffered justification should be assessed from an anti-differentiation or anti-subordination perspective,[126] focusing most of their discussion on the affirmative action cases. Nevertheless, commentators have overlooked the fact that race and sex discrimination models do not reflect the same choice between the anti-differentiation and anti-subordination perspective. The sex discrimination model of intermediate scrutiny permits courts to consider a much wider range of justifications for differentiations than does the race discrimination model of strict scrutiny.[127] Sometimes, courts use the flexibility of intermediate scrutiny to permit sex-based policies to pass muster

[126] Compare Williams, Equality's Riddle, supra note 2, at 325-28 (advocating anti-differentiation perspective) with C. MacKinnon, supra note 6, at 4-5 (adopting anti-subordination perspective); Krieger & Cooney, supra note 113, at 525-31 (same); Law, supra note 2, at 963 (same); Scales, supra note 2, at 430-31 (same).

[127] See text accompanying notes 89-105 supra.

when they redress subordination; other times, they use this flexibility to accept less laudatory justifications.[128] Thus, sex-based intermediate scrutiny does not reflect a rigid anti-differentiation perspective and can accomodate an anti-subordination perspective.

In contrast, courts reject virtually all justifications for race-based policies under strict scrutiny.[129] Some members of the Court have therefore found it necessary to apply intermediate scrutiny to race-based affirmative action policies in order to justify validation of those policies;[130] thus, race-based strict scrutiny has been too rigid to accomodate an anti-subordination perspective. In this Part, I will argue that the price of the courts taking race discrimination seriously, by adopting strict scrutiny and an anti-differentiation model of justification, has been an inability to consider the merits of using race-specific policies or actions to redress racial subordination. The separate but corresponding price of courts taking sex discrimination less seriously under the anti-differentiation model has been an inability to invalidate some invidious sex-based distinctions. The first Section in this Part will examine these implications in greater depth, first in the context of constitutional equal protection doctrine, and then in the context of the equal protection statutes. To illustrate these implications, the second Section will focus specifically on the education area, where the effects of the different levels of scrutiny have been the most obvious.

A. The Price of the Differing Levels of Scrutiny

Although *Brown v. Board of Education*[131] could be said to stand for the proposition that it is equally invidious to exclude whites from predominantly black educational institutions as to exclude blacks from predominantly white educational institutions, the Court in *Brown* was not faced with that issue. Instead, the Court was faced with the historical reality that blacks were receiving an inferior education, as well as the ineffectiveness of remedying segregation on a case-by-case basis.[132] A

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[128] Compare Kahn v. Shevin, 416 U.S. 351 (1974) (upholding state property tax exemption for widows because benefit was designed to ameliorate past economic discrimination against women) with Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding federal law requiring that only men register for the draft since only men were eligible for combat).

[129] See text accompanying notes 72-75 supra. But see United States v. Paradise, 107 S. Ct. 1053 (1987); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986); Local 28, Sheet Metal Workers' Int'l Union v. Equal Employment Opportunity Comm'n, 106 S. Ct. 3019 (1986). These recent affirmative action cases suggest a loosening of the traditional framework.

[130] See Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 361-62 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); text accompanying notes 134-38 infra.

[131] 347 U.S. 483 (1954).

[132] See text accompanying notes 61-75 supra.

strong statement was needed from the Supreme Court that would dramatically improve the educational benefits offered to blacks.

It was the history of subordination of blacks that moved the Supreme Court to respond with its strict ruling that racially separate education cannot be equal education.[133] Yet, the history in which *Brown* is rooted further suggests that race-specific policies or actions should be permitted to *redress* subordination. However, to uphold a justification of anti-subordination for a race-specific policy or action against constitutional challenge, some members of the Court have seen a need to lower the level of scrutiny.

Justice Brennan has most consistently taken this approach. He has developed an intermediate level of scrutiny to be used in the affirmative action area that, in large part, encompasses the anti-subordination approach suggested in this Article. For example, in *Regents of the University of California v. Bakke*,[134] Justice Brennan, joined by three other justices, stated that in race discrimination cases brought by whites that challenged race-specific policies and that did not involve fundamental rights, he would use an intermediate level of scrutiny that posed the following two questions: (1) Did the race-specific policy reflect an "important and articulated purpose," and (2) Did it "stigmatize[ ] any group or single[ ] out those least well represented in the political process to bear the brunt of a benign program"?[135] The first question is the traditional question in intermediate scrutiny cases;[136] the second question is not. This second question squarely places the focus on an anti-subordination justification by considering the impact on subordinated groups.[137]

Rather than conclude that racial distinctions are inherently invidious, the Brennan group's opinion in *Bakke* acknowledged that racial distinctions may be able to redress subordination. They rejected a "color-blind" approach to resolving affirmative action issues.[138] Under this low-

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133 See text accompanying notes 70-73 supra.

134 438 U.S. 265 (1978).

135 Id. at 361 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

136 See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (asking whether the classification serves "important governmental objectives and [is] substantially related to achievement of those objectives").

137 This is not to suggest that Justice Brennan's position represents a perfect articulation of the anti-subordination perspective. He does not evince the broad, societal view of subordination that I view as a necessary predicate to this perspective. In contrast, Justice Marshall holds a stronger anti-subordination position. In his separate concurrence in *Bakke*, Justice Marshall states, "It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact." 438 U.S. at 400.

138 They stated that the Court should not allow color-blindness to "become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior

ered level of scrutiny, the Brennan group would have accepted the specific plan used by the University of California. In contrast, under strict scrutiny, Justice Powell could not accept the University's plan and suggested that he could only accept an affirmative action plan phrased in more race-neutral language, as in the "Harvard" plan.[139]

Thus, in *Bakke*, the difference in the levels of scrutiny employed by Justices Powell and Brennan determined the outcome of the case. Justice Powell's strict scrutiny was less tolerant of race-specific policies than Justice Brennan's intermediate scrutiny. Because only five of the members of the Court reached the constitutional issue in *Bakke*, and only four were in agreement, the case does not provide insight into what level of scrutiny a majority of the Court would favor in the affirmative action context.[140]

The Court was most recently faced with the level of scrutiny issue in *United States v. Paradise*[141] and in *Local 28 of the Sheet Metal Workers'*

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both by the law and by their fellow citizens." Id. at 327 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).

Justice Blackmun, in his separate concurrence, also challenged the color-blind view: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy." Id. at 407 (Blackmun, J., concurring in part and dissenting in part).

[139] The Harvard plan considers race as one factor in a program to achieve more diversity. Id. at 316-18 (Powell, J., concurring). Much of Justice Powell's description of strict scrutiny fits into the pure anti-differentiation approach. For example, he stated that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." Id. at 289-90. Moreover, he rejected the use of the *Carolene Products* footnote focus on "discrete and insular minorities" in determining who should be protected under strict scrutiny. He noted that these characteristics have "never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny." Id. at 290. Most important, he insisted on an individual rights approach under which discrimination against whites is taken as seriously as discrimination against blacks. See id. at 291-99.

[140] The post-*Bakke* cases have not reduced the confusion over the appropriate level of scrutiny. The Court next faced a constitutional challenge to affirmative action in Fullilove v. Klutznick, 448 U.S. 448 (1980). Justice Burger, writing for a plurality, accepted the ten percent minority set-aside program as a limited and properly tailored remedy, but avoided the issue of the appropriate level of scrutiny. Like Justice Powell's opinion in *Bakke*, the Court's opinion in *Fullilove* suggested that strict scrutiny can accommodate some narrowly tailored affirmative action.

There was also a separation of powers issue in *Fullilove* that emerged most clearly in Justice Powell's concurrence. Justice Powell noted that it is appropriate for Congress, as the national legislature, to address directly the problem of discrimination in our society. Id. at 499 (Powell, J., concurring). He viewed as more problematic the attempts by nonlegislative institutions to make such determinations, as the university had done in *Bakke*. Id. at 498. Thus, we may be seeing a stricter level of scrutiny under the fourteenth amendment, when nonlegislative state actors are involved, than under the fifth amendment, when Congress's actions are involved. For further discussion of the issues raised in *Fullilove*, see Days, Fullilove, 96 Yale L.J. 453 (1987).

[141] 107 S. Ct. 1053, 1064 (1987).

International Association v. Equal Employment Opportunity Commission.[142] In each case, Justice Brennan wrote for the majority, upholding district court orders of race-conscious relief for individuals who were not identified victims of discrimination.[143] But Justice Brennan avoided the scrutiny issue in each of these cases by concluding that the respective programs could withstand even the highest level of scrutiny.[144] He was able to avoid the scrutiny issue because of the egregious set of facts of each case—a history of blatant racial discrimination within the defendant's institution, a long record of resistance to official efforts to end the discriminatory practices, and the limited and temporary impact of the plan on white workers.[145]

On balance, it seems that Justice Brennan is heading toward a coherent articulation of the anti-subordination principle.[146] But his framework leaves at least two problems unsettled. First, how does he know whether to apply strict scrutiny or intermediate scrutiny? Would he rely simply on whether the plaintiff is white in a race discrimination case or whether the plaintiff is male in a sex discrimination case?[147] Chief Justice Rehnquist has suggested that such a simplistic approach would be appropriate in the sex discrimination context.[148]

But differentiation based on the plaintiff's race or sex is not determinative of whether a policy or action is subordinating to blacks or women. For example, if a bar offers half-price drinks to women in order to attract

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142 106 S. Ct. 3019 (1986). Justice Brennan noted in *Local 28* that "[w]e have consistently recognized that governmental bodies constitutionally may adopt racial classifications as a remedy for past discrimination. . . . We have not agreed, however, on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures." Id. at 3052.

143 *Paradise*, 107 S. Ct. at 1064; *Local 28*, 106 S. Ct. at 3052.

144 See *Paradise*, 107 S. Ct. at 1064 ("We need not [reach consensus on the appropriate constitutional analysis] . . . in this case, . . . because we conclude that the relief ordered survives even strict scrutiny analysis . . . ."); *Local 28*, 106 S. Ct. at 3053.

145 See *Paradise*, 107 S. Ct. at 1058-1064; *Local 28*, 106 S. Ct. at 3053; see also Local No. 93 v. City of Cleveland, 106 S. Ct. 1063 (1986) (upholding race-conscious provision of consent decree with city without expressly reaching constitutional issue).

146 Justice Marshall also continually expresses an anti-subordination perspective. See, e.g., *Bakke*, 438 U.S. at 387 (Marshall, J.). Like Justice Brennan, Justice Marshall does not provide guidance about how to determine whether to use strict scrutiny or some lesser standard in the affirmative action context.

147 Although *Bakke* involved only a challenge of race discrimination, it seems that Justice Brennan would use the same approach in sex discrimination cases, because he cites sex discrimination cases as support for his use of lowered scrutiny in the affirmative action context. See id. at 358-59 (acknowledging use of intermediate level of scrutiny in sex discrimination cases where allegedly benign purpose exists).

148 See Craig v. Boren, 429 U.S. 190, 219-21 (1976) (Rehnquist, J., dissenting) (male plaintiff); see also Michael M. v. Superior Court, 450 U.S. 464, 476 (1981) (upholding statutory rape statute providing penalties for males but not females). Chief Justice Rehnquist's approach would presumably apply with equal force whenever the plaintiff is white in a race discrimination case.

more male and female customers,[149] men might challenge the policy as discriminatory on the basis of sex, since they cannot take advantage of the offer. Under Rehnquist's approach, the case would be subjected to lowered scrutiny because the plaintiffs are men. However, such a practice directly reinforces sex-role stereotypes about women and perpetuates women's subordination.[150] While the Brennan model tries to engage in a more probing analysis than simply asking the identity of the plaintiff, the model has dangerous implications in Chief Justice Rehnquist's hands.

Second, lowering the level of scrutiny in any subcategory of cases involving race discrimination might permit justifications other than redressing subordination,[151] as has occurred in the cases treating sex-discrimination.[152] Like race-based equal protection doctrine, sex-based equal protection doctrine has developed through the efforts of plaintiffs challenging subordination. For women, unlike blacks, this task was complicated by the need to attack "special protection" legislation that created sex-specific rules purportedly to assist women but that, in fact, helped to perpetuate paternalistic stereotypes about them.[153] Thus, opponents of sex discrimination have often attacked the propriety of sex-specific rules in an attempt to eradicate the subordination that stems from paternalistic "special" protection.[154]

The Supreme Court has not responded to these sex discrimination

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[149] See Peppin v. Woodside Delicatessen, 67 Md. App. 39, 506 A.2d 263 (Md. Ct. Spec. App. 1986) (successfully challenging half-price drink policy, first for "ladies" and then for persons wearing "skirts and gowns").

[150] The half-price drink policy demeans women by suggesting that their role is to be sexually available to men. It further supports the social stereotype that women should not be expected to pay for their own meals or beverages to the same extent as men. See generally, A. Dworkin, Pornography: Men Possessing Women 19-24 (1981) (discussing how men use money and sex to dominate women); C. MacKinnon, supra note 6, at 155-57 (discussing sex-role sterotypes).

[151] For example, Justice Douglas asserted that regulations based on race may be justified when a special trait or disease affects a particular group. Under this rationale, he viewed regulations banning the sale of liquor to North American Indians and Eskimos as permissible because of the devastating effect liquor has on these groups. See W. Douglas, We the Judges 399 (1956); see also Debbs, Constitutional and Practical Considerations in Mandatory Sickle Cell Anemia Testing, 7 U.C. Davis L. Rev. 507, 518-20 (1974) (arguing that mandatory testing for sickle cell anemia is not unconstitutional and will not lead to state restrictions on rights of blacks to marry and reproduce).

[152] See text accompanying notes 76-97 supra and 155-182 infra.

[153] For examples of such legislation, see Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding state statute that forbade women from becoming bartenders unless their husband or father was a bartender); Muller v. Oregon, 208 U.S. 412 (1908) (sustaining Oregon law that provided that "no female" shall be employed in any factory or laundry "more than ten hours during any one day"). The *Goesaert* Court, applying the classic rational basis scrutiny, did not seek to determine the legislature's actual reasons for the legislation. The evidence in the record suggested that the real reason that women were denied the opportunity was to maintain the male monopoly on bartending. See *Goesaert*, 335 U.S. at 466.

[154] See Williams, Equality's Riddle, supra note 2, at 334-35.

arguments consistently. Because it sometimes permits sex-specific policies or actions to withstand scrutiny,[155] the Court does not appear to have a pure anti-differentiation perspective in this area. Instead, the Court has waffled in response to plaintiffs' arguments against returning to a history of paternalistic subordination. While modern sex-based equal protection cases emerged from the belief that women have faced a history of subordination that must be redressed,[156] the decisions in *Reed v. Reed*[157] and its progeny have made it clear that the subordination of women is not the only justification that can survive intermediate scrutiny.

The genesis of this problem can be found in *Kahn v. Shevin*.[158] In its final footnote, the *Kahn* majority provided the first direct link between the level of scrutiny and the consideration of justifications for sex-specific policies or actions.[159] Justifying its acceptance of the state's purported argument for passing a tax statute favoring women, the Court rejected the necessity of determining the state's real motivation for passing the statute because

> [g]ender has never been rejected as an impermissible classification in all instances. Congress has not so far drafted women in the Armed Services. The famous Brandeis Brief in *Muller v. Oregon*, on which the Court specifically relied, emphasized that the special physical structure of women has a bearing on the "conditions under which she should be permitted to toil."[160]

Hence, *Kahn v. Shevin* shows that the development of intermediate scrutiny, which served to accommodate the principle of anti-subordination at the stage of justification, ironically also opened the door to affirmance of *subordinating* rationales for sex-specific policies. The Court in *Kahn* cited *Muller v. Oregon*[161] with approval to justify upholding a sex-specific rule under a lowered level of scrutiny, even though the ruling in *Muller* had contributed to the *subordination* of women by upholding extremely paternalistic limitations on the hours women could work.[162] The

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155 See text accompanying notes 76-97 supra.

156 See text accompanying note 87 supra.

157 404 U.S. 71 (1971). For a discussion of *Reed* and its progeny, see text accompanying notes 83-97 supra.

158 416 U.S. 351 (1974).

159 See id. at 356 n.10.

160 Id. (citations omitted).

161 208 U.S. 412 (1908).

162 The *Muller* Court had justifed the legislation with the following statement:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are

Muller Court had accepted the argument that women were the weaker sex and needed to be protected from long working hours in order to safeguard their reproductive capacities.[163] Continued acceptance of the *Muller* rationale was too high a price to pay for intermediate scrutiny, even though such a lowered level of scrutiny allows consideration of anti-subordination justifications for sex-specific rules.

If not for the footnote reference to *Muller*, one could easily argue that *Kahn* was a case that used the lowered-scrutiny model solely for the purpose of considering the principle of anti-subordination in a situation where few negative implications existed. The property tax exemption had little chance of furthering sexual stereotypes because it was not widely known by the public.[164] Moreover, nothing in the text of the majority opinion relied on outdated stereotypes of women for justification. Instead, the Court focused on widely accepted empirical evidence.[165] The negative implication of *Kahn*, however, was the death knell for pure strict scrutiny. Since *Kahn*, the Court has repeatedly used intermediate scrutiny to consider justifications other than the eradication of subordination.[166]

Under the Court's logic in these cases, regulations containing distinctions that are based on accurate empirical data can also survive intermediate scrutiny so long as those regulations serve an important governmental function or objective. In *Craig v. Boren*,[167] for example, the state articulated the important objective of traffic safety in setting different drinking ages for males and females.[168] The Court, however, struck down the statute because it concluded that the evidence did not demonstrate that sex was an accurate proxy for the regulation of drinking and driving.[169] If the empirical evidence had been stronger, the Court might have upheld the state's sex-specific policy even though it would not have furthered the principle of anti-subordination.

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essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421.

163 See id.

164 In fact, many widows were not even aware of the rule. A widow had to apply for the exemption in order to avail herself of it. *Kahn*, 416 U.S. at 359 n.5 (Brennan, J., dissenting).

165 Id. at 353 & nn.4-6 (opinion of Court).

166 See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding sex-specific statutory rape statute). For cases in which the Court considered, but ultimately rejected such justifications, see Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (invalidating women-only admission policy of state supported university); Craig v. Boren, 429 U.S. 190 (1976) (invalidating state law barring sale of beer to males under age 21 and females under age 18).

167 429 U.S. 190 (1970).

168 Id. at 199.

169 See id. at 199-202 & 199 n.7.

The *Craig* analysis has dangerous implications because it suggests that empirical evidence of socially created differences can justify sex-specific statutes, irrespective of whether these statutes seek to overcome a history of subordination. For example, in *Reed v. Reed*,[170] if the state had offered evidence that men, on average, had more experience and education in business matters, it is possible that the state's irrebuttable presumption for men as estate administrators would have survived. Clearly, such a statutory presumption would both further negative stereotypes about women and exacerbate women's inability to gain experience in economic matters, thereby contributing to women's subordination. Empirical evidence, no matter how strong, should not be allowed to further subordination. But the analysis in *Craig* suggests that it can.[171]

The fruits of *Reed* and *Craig* can be seen in the most troubling recent sex discrimination case decided under intermediate scrutiny, *Michael M. v. Superior Court*.[172] The petitioner in *Michael M.* challenged the constitutionality of California's statutory rape law, under which it was illegal to have sexual intercourse with a female under the age of eighteen but not illegal to have sexual intercourse with a male under the age of eighteen.[173] The seventeen-and-a-half year old male plaintiff, Michael M., had been convicted of statutory rape when he had sexual relations with a sixteen-and-a-half-year-old female, Sharon.

Justice Rehnquist, writing for a plurality, assumed that the state statute discriminated against men because it made "men alone criminally liable for the act of sexual intercourse."[174] Relying on *Reed* and *Craig*,

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170 404 U.S. 71 (1971).

171 Under the framework proposed by this Article, see text accompanying notes 252-56 infra, the *Craig* Court would have struck down the state statute more easily. At the prima facie case stage, the Court would have seen that the beer purchasing rule produced a disparate impact on males. At the justification stage, the Court would have readily seen that the policy in no way served to eliminate the subordination of women. Preventing drunk driving, the state's proposed justification, is an admirable goal, but it is entirely unrelated to eliminating sexual subordination. Indeed, the statute furthered sexual stereotyping by reinforcing the notion that only teenage boys, not teenage girls, drink and drive. Although the result in *Craig* would remain the same, analysis of the case in this manner would remove the implicit message *Craig* sent to the states, namely, that similar statutes might pass constitutional muster if better supported by empirical evidence. Under the proposed framework, *Craig* would instead stand for the rule that empirical evidence unrelated to the position of women in society is irrelevant in justifying such a statute.

172 450 U.S. 464 (1981).

173 Section 261.5 of the California Penal Code defined unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." Id. at 466 (citing Cal. Penal Code § 261.5 (West Supp. 1981)).

174 Id. Justice Rehnquist's statement seems to be premised on the assumption that a female could not be prosecuted for statutory rape if she had sex with another female who was under the age of 18. If the state would prosecute such an action under the statutory rape statute, then a woman could be held criminally liable for having sexual relations with another woman.

Justice Rehnquist applied intermediate scrutiny to the case, asking whether the gender-based classification had a fair and substantial relationship to legitimate state ends or important goverment objectives.[175] He concluded that the statute served the strong state interest in preventing illegitimate pregnancy.[176] In addition, he concluded that because all of the significant harmful and inescapable identifiable consequences of teenage pregnancy fall on the young female, the legislature had acted within its authority in electing only to punish the participant who, by nature, suffers few of the consequences of his conduct.[177]

Although the Court purported to ask how this legislation affected women, it did not do so from an anti-subordination perspective. For example, Justice Rehnquist did not consider whether Sharon desired state protection or found the sexual intercourse objectionable. He recognized that "this is not a case where a statute is being challenged on the grounds that it 'individiously discriminated' against females."[178] But he never examined the statute's significance to women. From an anti-subordination perspective, that issue should have been the heart of the inquiry.

Justice Rehnquist avoided that issue by asserting that the statute was "an attempt by a legislature to prevent illegitimate teenage pregnancy."[179] The paucity of evidence before the Court, however, strongly suggested that the desire to control pregnancy was, at best, a post hoc rationalization.[180] Moreover, that rationalization did not even fit with the provisions of the statute because the statute also made sexual intercourse with prepubescent females unlawful. The interest in limiting teenage pregnancy seemed to be as much a reflection of the state's interests in protecting its financial resources as in protecting the interests of women.[181]

Justice Rehnquist's statement would therefore be more accurate if he said that the state could only prosecute individuals who had sexual intercourse with an underage female but not individuals who had sexual intercourse with an underage male.

175 Id. at 468-69.

176 See id.

177 See id. at 473.

178 Id. at 475.

179 Id.

180 As Justice Brennan noted in his dissent, "even assuming that prevention of pregnancy is an important governmental objective and that it is in fact an objective of [the statute] . . . the state must produce evidence that will persuade the court that its assertion is true." Id. at 491-92 (Brennan, J., dissenting). Since the state did not produce such evidence, Justice Brennan argued the state had failed to show that its sex-based statute was substantially related to the supposed goal of reducing the rate of teenage pregnancies. Id. at 492-93. In any event, it is especially difficult to take Justice Rehnquist seriously in his assertion of the need to protect women from unwanted pregnancy, given his views on the abortion issue. See Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2192-2216 (Rehnquist, J., joining White, J., dissenting).

181 This concern about the state's financial resources is suggested in the following statement:

The use of intermediate scrutiny enabled Justice Rehnquist to bring in considerations unrelated to elimination of women's subordination in order to uphold a sex-based statute. Under the sloppy framework of intermediate scrutiny, he was able to allow such a statute to pass muster, although it is doubtful that an analogous race-based statute could have passed muster under strict scrutiny.[182]

B. The Flexibility of The Statutory Framework

The discussion thus far in this Part has concerned itself solely with constitutional doctrine that has evolved out of challenges to race- and sex-based discrimination brought under the equal protection clause. A somewhat different set of doctrinal developments has evolved from cases brought under the civil rights statutes.

In statutory cases, the courts use a framework that is generally more tolerant of race- or sex-specific policies or actions at the justification stage.[183] This tolerance can be problematic. Most significant, the courts' interpretation of the "bona fide occupational qualification" exception to

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"At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades, have significant social, medical, and economic consequences for both the mother and her child, and the *State*." Michael M., 450 U.S. at 470 (emphasis added).

[182] The best race-based analogy is Loving v. Virginia, 388 U.S. 1 (1967). In that case, the Supreme Court overturned a state statute that made it unlawful for white people to marry people of color. Although racial purity was the obvious goal of the statute, the state's rationale could have been seen as the prevention of unwanted births of mixed-race children, yet the Court was unwilling to consider the merits of that justification.

[183] See Note, Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach, 84 Yale L.J. 98 (1974). A greater tolerance of race- or sex-based effects in the statutory context can also be seen under the disparate impact model. If the plaintiff establishes a disparate impact case, the defendant can prevail with a showing of "business necessity." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). This justification does not reflect consideration of the principle of anti-subordination but, rather, reflects a concern for the convenience of the employer, although the allowance of this justification could perhaps be seen as a pragmatic corollary to the lowered threshold for making out a prima facie case under the disparate impact model. Nonetheless, this defense serves to perpetuate, rather than eradicate, the subordination of minorities and women.

The courts have, however, interpreted the business necessity test quite narrowly in disparate impact race cases. See, e.g., Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971). In its widely-followed formulation in *Robinson*, the Fourth Circuit explained the standard.

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Id. (footnote omitted).

Title VII[184] has served to promote, for example, stereotypes about women's vulnerability to rape[185] or need for privacy.[186] Similarly, educational discrimination claims can be defended with arguments about the importance of beauty pageants, single-sex housing, or single-sex education in undergraduate institutions.[187] Thus, while exceptions to the principle of anti-differentiation exist in the sex-based statutory model, few of these exceptions help redress subordination,[188] and some exceptions serve to exacerbate the subordination of women.[189]

But the advantage of this greater tolerance in the statutory context is that it has allowed the courts to permit arguments for anti-subordination to justify race- or sex-specific policies. It is clear that if a defendant is willing to admit a prior history of discrimination at its institution, it may be permitted to engage in race-conscious affirmative action.[190] The

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184 See text accompanying notes 102-03 supra.

185 See Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (upholding exclusion of women from prison guard positions because a "woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood").

186 See, e.g., Fesel v. Masonic Home, Inc., 447 F. Supp. 1346 (D. Del. 1978), aff'd mem., 591 F.2d 1334 (3d Cir. 1979). The BFOQ requirement has also been used to uphold a mandatory grounding policy for pregnant flight attendants. See Condit v. United Air Lines, 558 F.2d 1176 (4th Cir. 1977), cert. denied, 435 U.S. 934 (1978).

187 See text accompanying note 104 supra (discussing sex-based exceptions to Title IX).

188 One statutory exception to the principle of anti-differentiation that may help to redress women's subordination was recently explored in California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987). In *Guerra*, the Supreme Court held that the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1980) [hereinafter PDA], did not preempt a California statute that required employers to provide female employees an unpaid pregnancy disability leave of up to four months. Pregnant workers had an unqualified right to reinstatement after taking such a disability leave, irrespective of whether the employer allowed leave for other forms of disabilities. The PDA specifies that sex discrimination includes discrimination on the basis of pregnancy in determining whether an employer has violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (1982). Thus, the issue posed by the case was whether compliance with the California statute would constitute violation of the PDA, since nonpregnant workers were not entitled to disability leave whereas pregnant workers were. See *Guerra*, 107 S. Ct. at 686. Justice Marshall, writing for the Court, analyzed the legislative history of the PDA and concluded that its purpose was to improve the employment opportunities of women. Id. at 693-94. He therefore rejected a rigid anti-differentiation view and upheld the state statute as consistent with an anti-subordination purpose of improving women's employment opportunities. See id. at 695. Because *Guerra* was limited to a narrow issue of the construction of the PDA, it is hard to discern how portable its reasoning will be to future interpretations of Title VII.

189 For example, beauty pageants, where sex-role stereoptyping is explicitly rewarded, are exempt from Title IX. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(9) (1982).

190 See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3072-73 (1986); Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979). The constitutional equal protection analysis also seems receptive to this kind of proof, according to the Court's recent decision in Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1848 (1986) ("In particular, a public employer . . . must ensure that, before it embarks on an affirmative action program, it

Supreme Court's recent decision in *Johnson v. Transportation Agency*[191] extends this principle to sex-specific affirmative actions plans[192] and suggests that the evidence of discrimination need not be confined to the defendant's institution.[193] The Court emphasized that employers have a "relatively large domain for voluntary employer action;"[194] they are not limited to the actions that courts can order as remedies. *Johnson*, therefore, appears to stand for the proposition that employers may choose to create race- or sex-conscious affirmative action programs to redress subordination, although Title VII does not *require* them to take such steps.[195] Because the Court in *Johnson* carefully distinguished between what an employer may do voluntarily and what a court can impose as a remedy,[196] *Johnson* does not suggest that courts can try to remedy generalized, societal evidence of discrimination through race- or sex-specific programs.[197]

The *Johnson* decision may say more about the limits of the court's political power than about the principles of anti-differentiation and anti-subordination underlying Title VII or the equal protection clause. The *Johnson* Court seemed to recognize that race- and sex-based affirmative action plans may be the only way to remedy societal discrimination and that such plans are consistent with the underlying policy of Title VII.[198] However, the Court is uncomfortable with imposing those plans coercively. It would prefer for employers to choose voluntarily to remedy societal discrimination. Thus, the *Johnson* compromise (i.e., giving employers more power to impose sex-specific remedies than the courts) may be seen as another chapter in the Court's pragmatic resolution of the difficulties in achieving equality[199] rather than as a choice between anti-

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has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.").

191 107 S. Ct. 1442 (1987).

192 See id. at 1452-53, 1457.

193 In *Johnson*, the Court focused on whether there was a "manifest imbalance" between the percentage of women in the employer's work force and the percentage of women in the area labor market or general population. See id. at 1452-53.

194 Id. at 1452 n.8.

195 See id. at 1457 ("Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.").

196 See id. at 1452 n.8.

197 The Court's decision in Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986), made it clear that it is impermissible to consider general evidence of societal discrimination. Justice Powell stated: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." Id. at 1847.

198 See *Johnson*, 107 S. Ct. at 1457.

199 See text accompanying notes 53-57 supra.

differentiation and anti-subordination. Although the Court recognizes that the dominant principle underlying nondiscrimination is anti-subordination,[200] it also recognizes that there may be pragmatic limitations to enforcement of that principle.

In sum, then, the Court's experimentation with varying levels of scrutiny of race- and sex-specific policies, in both the constitutional and statutory settings, has had both positive and negative implications for the effort to bring forth an anti-subordination approach to equal protection. The greater tolerance of sex-specific policies has led to the positive result that policies and laws that differentiate for the purpose of eliminating subordination pass muster, but also to the negative result that sex-specific policies or actions serving less important, often invidious, purposes also survive. By contrast, the lesser tolerance of race-specific policies under strict scrutiny has led to the positive result that virtually no race-specific policy can pass muster, but has also led to a rather awkward attempt to accommodate race-specific remedies ordered for the purpose of redressing a particularly egregious case of subordination.[201]

Commentators have largely overlooked these important implications.[202] One reason for this failure may be that most commentators do not compare race and sex discrimination doctrine, but rather work in one area.[203] I have therefore attempted to bring these two areas together to

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200 In Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986), for example, the Supreme Court reaffirmed its commitment to the principle of anti-subordination in its quotation of the following passage from Steelworkers v. Weber, 443 U.S. 193 (1979):

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Local No. 93, 106 S. Ct. at 3072-73 (quoting *Weber*, 443 U.S. at 204 (quoting 110 Cong. Rec. 6552 (1964) (statement of Sen. Humphrey))); see also *Johnson*, 107 S. Ct. at 1450 (quoting same passage).

201 See United States v. Paradise, 107 S. Ct. 1053 (1987).

202 See articles cited in notes 2, 4, 6-7, 9-13, 15-17 supra. For examples of race and sex comparisons from perspectives compatible with this Article's view, see Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1050-56 (1979); Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1710-13 (1984).

203 There is, however, an emerging group of scholars who write about black women. See, e.g., All the Women are White, All the Blacks are Men, But Some of Us are Brave (G. Hull, P. Scott & B. Smith eds. 1982) (examining society's treatment of black women); Home Girls: A Black Feminist Anthology (B. Smith ed. 1983); Getman, Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System, 7 Harv. Women's L.J. 115 (1984) (examining impact of racial caste system among black women under slavery); Omolade, supra note 112; Wriggins, Rape, Racism & the Law, 6 Harv. Women's L.J. 103 (1983) (tracing racism inherent in society's treatment of rape issues). The primary goal of this scholarship is to develop a view of race and sex discrimination that can account for the experience of black women, without describing that experience as simply the combination of race and sex discrimination. Such an approach has received some acceptance within law. See, e.g., Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025, 1032-35 (5th Cir. 1980) (finding

make clear that the consideration of anti-subordination justifications has not been without a stiff price.

C. A Case Study: Education

Developments in the education area of equal protection jurisprudence most clearly illustrate that intermediate scrutiny resulted from the consideration of justifications for sex-specific policies or actions. The trade-off has been most evident in cases challenging the existence of single race and single sex colleges. While intermediate scrutiny has permitted justifications for all-women's colleges in the sex discrimination context,[204] all-black colleges or predominantly black faculties at black colleges have not been accorded the same latitude because of the strict scrutiny applied to racial differentiation.[205] Similarly, while strict scrutiny has permitted strong efforts to desegregate white institutions,[206] intermediate scrutiny has made it difficult to require integration of single sex institutions.[207] This section will examine each of these phenomena in turn.

1. Black Colleges

The desegregation of both white and black colleges has been an important chapter in the history of racial desegregation.[208] In the 1960s, many black educators became concerned with the tendency of states to build new white colleges or develop existing ones while ignoring predominantly black institutions located nearby.[209] Fearing that desegregation would threaten the future of black institutions, they argued that black schools should be permitted to retain their identity while allowing

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that black woman's claim of race and sex discrimination in employment could survive motion for summary judgment even if she could not articulate separate allegations of race or sex discrimination). However, this special synthetic view has received virtually no attention within mainstream legal scholarship.

204 See text accompanying notes 227-48 infra.

205 See text accompanying notes 218-26 infra.

206 See text acccompanying notes 68-75 supra.

207 See text accompanying notes 227-48 infra.

208 For an excellent discussion of this history, see Shades of Brown, supra note 15; see also Kluger, supra note 60.

209 Nevertheless, the arguments of black educators have been largely ignored. For example, according to Professor Bell, minority scholarship was entirely ignored during the *Bakke* litigation. Bell, Bakke, supra note 5, at 3-4. The only law review articles cited in the Supreme Court opinions in *Bakke* were written by whites. Id. For a list of articles by minority scholars that the Court failed to cite, see id. at 4 n.2. For a more recent discussion of the discouragement of minority writing in the area of racism, and of the absence of attention to the minority work that does exist, see Delgado, Commentary, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. Pa. L. Rev. 561 (1984); Delgado, The Author Replies, 3 Law & Inequality 261 (1985).

admissions of whites on a nondiscriminatory basis.[210] They further advocated that such institutions be given both adequate budgets and the primary responsibility for aspects of education of particular interest to the black community, such as social welfare, community planning, and community public health.[211] Most important, they urged that black colleges not be consigned to oblivion through abandonment or consolidation just at the period when their services were most needed in the black community.[212]

Nevertheless, *Brown* was viewed as having resolved the unconstitutionality of any system, however voluntary, that maintained predominantly black institutions.[213] The issue of what steps predominantly white institutions could take to admit blacks preferentially, in order to achieve racial integration, remained unresolved for many years.

Though many educators and civil rights groups argued that predominantly white colleges should be able to have special admissions programs to recruit and admit minority applicants in order to remedy a history of past discrimination, the Supreme Court held, in *Regents of the University of California v. Bakke*,[214] that such a program could not rely exclusively on race-specific criteria.[215] Writing to express the Court's judgment, Justice Powell's opinion in *Bakke* probed the difference between strict scrutiny and intermediate scrutiny. He determined that he could not apply intermediate scrutiny to the preferential classifications, precisely because intermediate scrutiny represents a less serious attitude toward discrimination than strict scrutiny.[216] His argument implicitly suggested that preferential treatment could only be upheld under intermediate scrutiny and that that level of scrutiny was inappropriate in the racial context:

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210 Goodwin, Southern State Governments and Higher Education for Negroes, 100 Daedalus 783, 787-88 (1971); Harper, The Legal Status of Black Colleges, 100 Daedalus 772, 777-78 (1971); see also Carter, A Reassessment of Brown v. Board of Education, in Shades of Brown, supra note 15, at 21-28 (emphasizing that focus of *Brown* was equal educational opportunity rather than integration); Lightfoot, Families as Educators: The Forgotten People of Brown, in Shades of Brown, supra note 15, at 3-19 (arguing that desegregation has been overemphasized in terms of its impact on improving education of blacks); Ravitch, Desegregation: Varieties of Meanings, in Shades of Brown, supra note 15, at 31-47 (arguing that desegregation should mean removal of all barriers based on race but not dismantling of autonomous black institutions).

211 Goodwin, supra note 210, at 787-88.

212 Harper, supra note 210, at 777.

213 See Green v. County School Bd., 391 U.S. 430, 435-38 (1968).

214 438 U.S. 265 (1978).

215 Id. at 320 (Powell, J., concurring). Five Justices agreed, however, that the Davis medical school could take race into account as part of a larger program with numerous other neutral criteria for determining admissions. See id. at 322 (Brennan, White, Marshall and Blackmun, JJ., concurring).

216 See id. at 302-03.

> Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. . . . The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classifications as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.[217]

Thus, current strict scrutiny analysis does not allow an interest in diversity in admissions to justify a purely race-conscious admissions program. This Article argues that the principle of anti-subordination should be incorporated into the strict scrutiny framework so that such a program could be upheld without lowering the level of scrutiny. Were bona fide justifications based on the principle of anti-subordination allowed under strict scrutiny review, affirmative action programs that were carefully designed to redress a prior history of subordination could withstand equal protection challenges.

Moreover, black colleges could maintain preferential admissions plans as well, providing they could demonstrate a need within the black community for such institutions. Although *Brown v. Board of Education*[218] rested on the premise that black students receive virtually no benefits from being educated in an all-black environment with only black children, the *Brown* court was reacting to a history of segregation forced upon the black minority by the white majority. The Court did not contemplate the inherent qualitative difference in an institutional environment that became predominantly black by choice. Strict scrutiny should tolerate such programs where a clear anti-subordination justification is articulated and substantiated. Such scrutiny should extend to faculty employment issues as well. Minority students, as well as white students, benefit, in terms of heightened self-esteem and broadened world views,

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[217] Id. In contrast to Kahn v. Shevin, 416 U.S. 351 (1974), where the Court upheld a property tax exemption for women, the Court in *Bakke* refused to use general population statistics about racial educational opportunities to justify the program. Instead, it insisted that the state would have to demonstrate that the "classification is responsive to identified discrimination." 438 U.S. at 309.

Nevertheless, the University was able to argue successfully for the right to select a diverse student body, as protected by the first amendment. Balancing first amendment and fourteenth amendment interests, the Court stated: "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." Id. at 315.

[218] 347 U.S. 483 (1954).

from having minority role models on the faculties and administrative staffs of their schools. Yet, under strict scrutiny analysis, the courts have not been able to consider the potential benefits of predominantly black colleges or black faculties. In the last ten years, there have been four cases involving hiring at black colleges.[219] In not one of these cases did the courts attempt to justify the unequal treatment of whites by considering the special status of black colleges in the educational process. Instead, the courts used strong language to express their unwillingness to consider the special posture of these schools. For example, in *Craig v. Alabama State University*[220] the defendant had argued that it was justified in treating blacks preferentially in hiring because blacks had virtually no employment alternatives in the institutions of higher education elsewhere in the state.[221] The defendant presented strong statistical data that blacks comprised less than one percent of the administrative staff or faculty of other institutions in the state.[222] Nonetheless, the court rejected these facts as a justification for discrimination against whites.

> It was precisely this type of argument which individual white universities used to attempt to defend themselves against desegregation efforts in the early days after Brown v. Board of Education. When brought to court to answer for their discriminatory practices, these schools would argue that if other universities could discriminate, so could they. The answer to this contention is the same now as it was then. A party guilty of discrimination can receive no solace or support from the fact that others have acted contrary to law.[223]

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219 See Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980); Fisher v. Dillard Univ., 499 F. Supp. 525 (E.D. La. 1980); Craig v. Alabama State Univ., 451 F. Supp. 1207 (M.D. Ala. 1978), aff'd, 614 F.2d 1295 (5th Cir. 1980); Planells v. Howard Univ., 32 Fair Empl. Prac. Cas. (BNA) 336, 33 Empl. Prac. Dec. (CCH) ¶ 34,089 (D.D.C. 1983).

220 451 F. Supp. 1207 (M.D. Ala. 1978), aff'd, 614 F.2d 1295 (5th Cir. 1980). A civil rights class action had been brought against the University alleging that it had engaged in a pattern and practice of discrimination against whites in its employment practices. The action was brought under both 42 U.S.C. § 1983 (1982) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to -17 (1982), thus both constitutional and statutory issues were presented. The court began its analysis with the assertion that "the Constitution and the civil rights statutes pursuant to which this suit is brought outlaw affirmative discrimination against whites as well as against members of racial minorities." 451 F. Supp. at 1208. It then proceeded to analyze the case exactly as it would have analyzed an employment discrimination case brought by a black against a predominantly white institution, and found that the institution had unlawfully discriminated. See id.

221 Id. at 1214.

222 See id.

223 Id. Two years later, the Fifth Circuit followed this approach in a case successfully brought by a white plaintiff against a predominantly black school. *Whiting*, 616 F.2d at 116. Similarly, in *Fisher*, 499 F. Supp. at 525, the district court found that a white woman suffered racial discrimination at a predominantly black institution, and held that she satisfied the first step of the prima facie case "because she is white, she was employed by a predominantly black institution, and race is an impermissible employment consideration." Id. at 530. Indeed, the fact that the institution was predominantly black assisted the plaintiff in asserting her case.

Similarly, in 1983, Howard University argued in defense of its preferential treatment of a black applicant that as a historically black institution of higher education, it should be subject to lesser scrutiny.[224] The court rejected this argument.

> Howard University's novel defense to this Title VII action violates the very spirit of racial equality which has animated the civil rights movement since the historical Supreme Court decision in *Brown v. Board of Education*. Defendant's suggestion that black institutions are free to give preference to blacks in faculty recruitment and promotion marks it, in this Court's view, as an apostate to the cause of racial equality. Ironically, many eminent leaders in the civil rights movement of the past half-century emanated from the halls of the Howard University, which now asks this Court to abandon the "colorblind" policies for which those leaders fought.
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> . . . .
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> Nor can Howard University's discriminatory actions be defended on the ground that black colleges "are not required to integrate the teaching staff in such a fashion that teaching opportunities for Blacks in the total [academic] work force should be diminished." Although we are aware that blacks represent a small proportion of the Ph.D.'s in the United States today, perhaps as little as three percent, employment opportunities for black academics are likely to be good relative to their white counterparts precisely because of their small number and because major universities are consciously seeking to increase the representation of blacks and other minorities on their faculties.
>
> Therefore, defendant's novel defense theory is no more than a weak post hoc rationalization for a racial preference which clearly violates federal civil rights laws and the spirit of racial equality.[225]

The court thus refused to consider the anti-subordination argument, holding instead that the principle of anti-differentiation always overrides the principle of anti-subordination in race cases.

Every court that has considered the issue has found that black institutions do not have a cognizable argument for retaining their identity as black institutions. The courts have viewed it as equally invidious for a black institution to discriminate against whites as for white colleges to discriminate against blacks. The policy of eliminating subordination has not been accepted as a justification for differentiation on the basis of race. This approach has needlessly curtailed the means available to overcome a history of racial subordination. If that history inspired the development

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The defendant did not gain from the argument that black institutions play a special role for the black community, and thus should be specially protected.

[224] Planells v. Howard Univ., 32 Fair Empl. Prac. Cas. (BNA) 336, 33 Empl. Prac. Dec. (CCH) ¶ 34,089 (D.D.C. 1983).

[225] Id. at 345 n.1, 33 Empl. Prac. Dec. (CCH) ¶ 34,089, at 32, 135 n.1 (citations omitted).

of the strict scrutiny test in the first instance, then that history should also lead courts to permit measures that can help overcome subordination. It is irrational to create a test designed to eliminate the effect of this history of subordination and then implement the test in such a narrow fashion that it impedes the achievement of that goal. The framework proposed by this Article[226] would create greater flexibility without having an overall detrimental effect on the level of scrutiny.

2. *Women's Colleges*

Courts have been far more sympathetic to the argument that an all-women's college may constitutionally serve a substantial state interest.[227] The recognized state interests have included not only anti-subordination but a variety of other goals. Because women's colleges have historically employed both male and female faculty,[228] the context in which these cases have arisen is admissions rather than hiring. The underlying issues, however, have been very similar to those in race cases; yet, the outcomes have been quite different.

The courts have repeatedly accepted the concept of "separate but equal" in the sex discrimination context. For example, in *Vorchheimer v. School District of Philadelphia*,[229] a challenge to single-sex schools in the

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226 See text accompanying notes 252-56 infra.

227 The first word from the Supreme Court on this issue came in the Court's summary affirmance of Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971). The Court affirmed *Williams* on March 8, 1971, see 401 U.S. at 951, just one week after probable jurisdiction was noted in Reed v. Reed, 404 U.S. 71, prob. juris. noted, 401 U.S. 934 (1971). Hence, the Court had decided to hear *Reed* but had not yet begun to develop a heightened standard of review in sex-based equal protection cases.

The *Williams* Court summarily affirmed a three-judge district court's holding that a single-sex admissions policy in an all-female state college was constitutional. 401 U.S. at 951. Although the Court does not provide its reasoning in a summary affirmance, it is fair to assume, based on the reasoning of the lower court, that the case stands for separate but equal doctrine in the single-sex education context. The lower court had observed that the all-female school needed to be examined in the context of the range of educational institutions available. 316 F. Supp. at 137. Because there was only one all-female school and only one all-male school, and many coeducational institutions available, the lower court had found that no substantial unequal treatment existed. Id. A second crucial factor influencing the court's decision was a stipulation by the parties that "there is a respectable body of educators who believe that 'a single-sex institution can advance the quality and effectiveness of its institution by concentrating upon areas of primary interest to only one sex.' " Id.

In 1976, the Third Circuit followed *Williams* in Vorchheimer v. School Dist., 532 F.2d 880, 887 (4th Cir. 1976), aff'd mem., 430 U.S. 703 (1977).

In the statutory context, Congress has also approved single-sex education. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1), (5) (1982) (exception for undergraduate single-sex education).

228 See generally H. Horowitz, Alma Mater: Design and Experience in the Women's Colleges from Their Nineteenth-Century Beginnings to the 1930s, at 4, 179-82 (1984) (discussing history of all-women's colleges).

229 532 F.2d 880 (3rd Cir. 1976), aff'd mem., 430 U.S. 703 (1977).

Philadelphia school district, the Third Circuit confronted the argument that precedents from race discrimination cases prohibited sex-segregated education.[230] The court, however, rejected that analogy.

> We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law. As the Supreme Court has said, "[g]ender has never been rejected as an impermissible classification in all instances."[231]

Implicit in the court's discussion of the race cases was the assumption that strict scrutiny would not permit a dual school system. The availability of rational basis or intermediate scrutiny in the sex context was used to distinguish the race cases. Yet, the argument accepted under lowered scrutiny was not an argument for anti-subordination. No special concern for providing girls with educational opportunities that they were previously unable to obtain was evident. It appeared that the court accepted the unsubstantiated premise that boys and girls *equally* benefit from single-sex education because they study more effectively in a single-sex environment.[232] Although there may be versions of this argument with anti-subordination nuances, namely, that girls should have the option of studying and developing leadership skills in an environment free of the sexism of male teachers and students,[233] there was no evidence that such opportunities were available in this case. The conclusory analysis used by the *Vorchheimer* court is dangerous because it can perpetuate subordination through the reinforcement of stereotypical views.

The Supreme Court's 1982 decision in *Mississippi University for*

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230 See id. at 886.

231 Id. (quoting Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974)). The court then found that the school district had met its burden of justification under both the rational basis test and the intermediate scrutiny test. Id. at 888. It found that the record contained sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. "Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship." Id. The court overlooked available evidence that the boys' high school (called Central High School) was much better than the girls' high schoool (called Girls High). See Burns, Apologia for the Status Quo (Book Review), 74 Geo. L.J. 1791, 1801-02 (1986).

232 See *Vorchheimer*, 532 F.2d at 888.

233 For an excellent discussion of such benefits, see Feldblum, Krent & Watkin, Legal Challenges to All-Female Organizations, 21 Harv. C.R.-C.L. L. Rev. 171 (1986). Although these authors have superbly canvassed the anti-subordination arguments for distinguishing all-female organizations from all-male organizations, they rest their analysis upon the special protection line of cases without recognizing the danger of such reliance. They seem to assume that the only permissible justification under the special protection case law is anti-subordination. As this Article has demonstrated, that is a false premise. See text accompanying notes 158-82 supra.

Women v. Hogan[234] clarified the bounds of the *Vorchheimer* court's approach. In *Hogan* the Court was faced with the question of whether a state could constitutionally maintain a nursing program in which course credit was only available to women.[235] The majority held that it could not,[236] but suggested that its answer might have been different with respect to other programs. The majority noted in a footnote that its decision did not resolve whether the admissions policy, as applied to men seeking admissions to schools other than the school of nursing, violated the fourteenth amendment.[237] In contrast to the strong language in *Brown v. Board of Education*,[238] the Court did not find that separate is always unequal or invidious. Thus, even though the single-sex policy was struck down in *Hogan*, the principle of anti-differentiation was not accorded nearly as much weight as it had been accorded in race cases.

The four dissenting Justices in *Hogan* argued more overtly that "separate but equal" is still a valid claim in sex discrimination cases.[239] From their arguments, coupled with the majority's footnote, one can then infer that the Court might uphold a public all-female business school that was founded with the purpose of enhancing opportunities for

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234 458 U.S. 718 (1982).

235 See id. at 721.

236 Id. at 731.

237 Id. at 723 n.7.

238 347 U.S. 483 (1954). According to the Court in *Brown*: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Id. at 495.

239 In his dissenting opinion, Chief Justice Burger stated that the majority's decision did not question that the "[s]tate might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program." 458 U.S. at 733 (Burger, C.J., dissenting). Justice Blackmun dissented and made the following plea for flexibility in the sex discrimination context:

> I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice.

Id. at 734 (Blackmun, J., dissenting).

In other words, Justice Blackmun argued that intermediate scrutiny, as applied by the majority, did not accord sufficient weight to the special sex role values that many elements of our society wish to maintain. Single-sex education has historically been one of those values, according to Blackmun.

Finally, Justices Powell and Rehnquist argued strongly that single-sex education is a valid tradition that should not be lost. For example, Justice Powell favorably quoted the arguments made by students and alumnae of Mississippi University for Women (MUW), as amici, in favor of single-sex education.

> [MUW] can serve to overcome the historic repression of the past and can orient women to function and achieve in the still male dominated economy. It can free its students of the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis.

Id. at 739 n.5 (Powell, J., dissenting).

women. Anti-subordination might, in the proper case, justify differentiation.

By contrast, Howard University Law School would have little success arguing that it should be able to limit itself exclusively or primarily to blacks because blacks have historically been given few opportunities to study law and would benefit from the opportunity to work together in greater numbers.[240] The source of the difference between these hypothetical results is found in the level of scrutiny and in the Court's consideration of sex-related anti-subordination arguments.[241]

The *Hogan* Court recognized that "a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."[242] The Court, however, did not view this analysis as independent of intermediate scrutiny;[243] it saw such justification as an intrinsic aspect of that level of scrutiny, equivalent in importance to many other justifications that have been offered in the sex discrimination context. The Court examined the purported anti-subordination rationale under intermediate scrutiny, but rejected it because it was supported by neither empirical evidence nor the actual policies of the state.[244]

The important question is not whether the defendant university was correct in extolling the benefits of single-sex education. Rather, the crucial issue was: At what cost to sex discrimination jurisprudence were certain members of the Court willing to consider such arguments? What other "values" would the dissenters, such as Justice Blackmun,[245] care to promote in the sex role context, other than single-sex education?

We do know what some of those other values are, and we have seen the retrogressive results of their consideration. The value of avoiding sending women into combat has permitted the complete exclusion of women from draft registration and induction into the armed services.[246] The value of recognizing women's special reproductive role has permit-

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240 Cf. Planells v. Howard Univ., 32 Fair Empl. Prac. Cas. (BNA) 336, 33 Empl. Prac. Dec. (CCH) ¶ 34,089 (D.D.C. 1983).

Given Howard University Law School's impact on the development of the civil rights movement's legal strategy, see R. Kluger, supra note 60, at 126-32, it is ironic that Howard University Law School can not take affirmative steps to maintain its character as a black institution serving as a beacon for the civil rights community.

241 See *Hogan*, 458 U.S. at 723-26.

242 Id. at 728.

243 The majority characterized its level of scrutiny as intermediate, id. at 723-25 & 724 n.9, and then explored the state's argument that the single-sex policy compensated for discrimination against women and, therefore, constituted educational affirmative action, id. at 727.

244 Id. at 728-31.

245 See note 239 supra.

246 See Rostker v. Goldberg, 453 U.S. 57 (1981).

ted men, but not women, to be convicted for statutory rape.[247] The value of providing veterans with lifetime public employment benefits has justified veterans preference statutes that greatly limit women's employment opportunities.[248] This Article therefore argues that while equal protection analysis should permit consideration of the anti-subordination values inherent in, for example, some single-sex education programs, it should not do so in a framework of lowered scrutiny that permits consideration of other, invidious values.

IV

BRINGING THE PRINCIPLE OF ANTI-SUBORDINATION TO THE FOREFRONT

Race- and sex-based equal protection doctrine emerged from a concern for the subordination of blacks and women. Nevertheless, the equal protection framework that has evolved does not allow that concern to have its fullest expression. At the stage of the prima facie case, the anti-differentiation principle currently dominates the constitutional analysis. That principle creates the presumption that *all* race- and sex-*specific* policies are discriminatory, and that *no* race- and sex-*neutral* policies are discriminatory unless accompanied by race- or sex-specific motivation.[249] The anti-differentiation principle also dominates the statutory analysis, with the presumption that all race- and sex-specific policies are discriminatory; however, the statutory analysis more flexibly recognizes that race- and sex-neutral policies can have a discriminatory effect, even where proof of discriminatory motivation is lacking.[250] At the stage of justification, the anti-differentiation principle has dominated review of the discrimination claims that the courts have taken most seriously—race cases. In sex discrimination cases, courts have been more willing to deviate from the principle of anti-differentiation, sometimes to consider arguments less laudatory than anti-subordination.

These theoretical inconsistencies have created numerous practical difficulties. Race- or sex-specific policies are often necessary to overcome structural inequalities within an institution, yet such policies are rendered presumptively invalid at the prima facie case stage. Only sex-specific policies survive an equal protection challenge through an awkward and dangerous use of intermediate scrutiny at the justification stage;[251]

247 See Michael M. v. Superior Court, 450 U.S. 464 (1981).

248 See Personnel Adm'rs of Mass. v. Feeney, 442 U.S. 256 (1979) (upholding state policy of hiring and promoting veterans over non-veterans, after finding preferential classification not to be pretext for sex discrimination).

249 See text accompanying notes 54-55, 72-75 supra.

250 See text accompanying notes 51-54 supra.

251 See text accompanying notes 151-82 supra.

race-specific policies have almost no chance of survival under strict scrutiny.[252] Given these difficulties with the existing framework, I propose modification of the existing approach in two respects.

The first modification eliminates the presumptive invalidity of race- or sex-specific policies at the prima facie case stage. Under the proposed framework, such a policy would not be presumed invalid unless it produces a negative disparate impact on a particular racial or ethnic group, or on a single sex. Under this framework, a race- or sex-specific rule could be viewed as a positive step towards eliminating race- or sex-based inequalities, as redressing subordination rather than creating differentiation.

The second modification more directly incorporates the anti-subordination approach into the stage of justification. As the discussion in Part III demonstrates, the limited successes of anti-subordination advocates have come at the expense of the overall level of scrutiny. Rather than criticize the lowered level of scrutiny, anti-subordination advocates have tried to tailor their arguments to nebulous standards, like "compelling interests," that courts have used in effectuating the intermediate level of scrutiny. But the adverse effects that accompany lowered scrutiny need not be tolerated. A strict level of scrutiny can be preserved if it is recognized that the *only* justification for race- or sex-specific policies is the redress of a prior experience or history of subordination. This anti-subordination version of the equal protection model can bring the discussion of subordination to the forefront of the equal protection analysis.

The proposed framework has two key advantages. First, it would allow institutions to implement and defend remedial race- and sex-specific policies and actions without having to rely on stereotypes about minorities or women. A defendant would be able, at the justification stage, to show that its policy would help eliminate subordination. Second, the framework would ensconce the normative values of anti-subordination within the entire equal protection analysis and thereby make that analysis more meaningful. Under the existing equal protection model, the courts have yet to resolve fully whether they prefer the principle of anti-differentiation to that of anti-subordination. This framework would provide the analytic process of equal protection with a consistent theoretical base.

A. Making the Most of the Disparate Impact Method of Proof

The disparate impact model has been a powerful tool in the hands of plaintiffs challenging facially neutral rules that have discriminatory ef-

252 See text accompanying notes 72-75 supra.

fects, although its use has thus far been too limited.[253] To make it more effective, the concept of disparate impact should be expanded to include socially created impact. In addition, this model should be available to defendants to justify facially differentiating rules that help eradicate subordination. Instead of creating a presumption that a rule is invidious when it is phrased in race- or sex-specific terms, courts should consider the impact of the rule. Just as race- or sex-neutral policies or actions may have either invidious or benign effects, race- or sex-specific policies or actions may also have either invidious or positive effects. Accordingly, courts should always look to the effect of a rule, even when the language is race- or sex-specific. Thus, both facially differentiating and facially neutral rules, when they cause disparate impact on the basis of race or sex, would have to be justified with heightened scrutiny.

This modification does not require that facial differentiation be wholly irrelevant. We have seen historically that facial differentiation can be extremely powerful in perpetuating subordination. However, it can also have a very powerful impact on redressing subordination. It is, difficult to imagine racial or sexual differentiation in rulemaking not having any impact one way or another on subordination.[254] The important point is that we should not assume that differentiation always abets subordination. We should allow the courts to consider more fully the possibility that differentiation, on the contrary, often redresses subordination.

Accordingly, under the proposed framework, plaintiffs would continue to present evidence of differentiation at the prima facie case stage. However, they would be required to supplement that evidence with an explanation of how that differentiation contributes to their subordination. The trial court would make a specific finding as to whether the differentiation contributed to, or redressed, subordination. It would rarely have the option of finding that the differentiation had no effect on subordination, because differentiation is too powerful a tool not to have any effect in the vast majority of situations.

The implications of this proposed framework can be seen in its application to the earlier hypothetical about a leave policy that has a disparate impact on black women.[255] Let us assume that the employer decides to implement a new four-week leave policy for nonprofessional black female workers who have primary childcare responsibilities that are exac-

253 See text accompanying notes 123-25 supra.

254 Although some might suggest that certain differentiating rules, such as separate public restrooms and clothing regulations, have a de minimus or trivial effect on subordination, I disagree. For criticisms of the view that such regulations are trivial, see Wasserstom, supra note 49, at 592-94; Whisner, Gender-Specific Clothing Regulation: A Study in Patriarchy, 5 Harv. Women's L.J. 73, 118 (1982).

255 See text accompanying notes 111-12 supra.

erbated by extenuating circumstances, such as difficult bus schedules or unavailability of day care resources. The employer wishes to redress the disparate impact of the previous leave policy, and chooses this leave policy rather than a race- or sex-neutral leave policy because it does not feel a responsibility to subsidize the child care needs of all of its employees. Rather, it only wants to subsidize those needs when they have a negative impact on employment opportunities. In the employer's experience, that problem only exists for black nonprofessional female workers.

Under the current equal protection model, white male, black male, and white female nonprofessionals would be able to establish a prima facie case of discrimination because of the explicit differentiation embodied in the policy. By contrast, under the proposed framework, these plaintiffs would have an additional hurdle—they would also have to allege disparate impact. The issue then would become how to measure disparate impact. Are the white men, who receive only two weeks of leave time, suffering from a loss of employment opportunities by virtue of this new policy? Is the difference in leave time, alone, sufficient to establish disparate impact or should a more tangible loss of employment opportunities be required? This Article argues that these questions must be answered from an anti-subordination perspective. Thus, although white male employees might be able to show "disparate impact" from a literal point of view, in that they receive less leave time, they would probably be unable to show on these facts that it rose to the level of a *subordinating* disparate impact. By contrast, it is conceivable that nonprofessional white women might be able to make out a colorable claim of disparate impact with evidence of a more substantial loss of employment opportunities. The purpose of the proposed framework is to make a discussion of anti-subordination occur, not to provide an easy answer as to how it should be resolved.

B. Restricting the Means of Justification

If the plaintiffs challenging the new leave policy establish a prima facie case of discrimination, through disparate impact, then the case would proceed to the stage of justification. Under the existing equal protection framework, such a policy could not be justified without lowering the level of scrutiny to an intermediate level of scrutiny.[256] Under the proposed framework, a strict level of scrutiny is maintained, and this policy could be justified only if it was established to overcome subordination. Was the employer acting on the basis of traditional stereotypes? Or was the employer acting consciously to eliminate subordination? How do the black women within the workplace view the policy? Do they be-

[256] See text accompanying notes 131-40 supra.

lieve that it is helping to establish equality within the workplace? Again, this is a factual inquiry that this Article cannot resolve in the abstract. Even if the court found the policy unjustified, the proposed framework would have the crucial effect of basing the discussion on a normative principle of anti-subordination.

This new framework would essentially relabel "affirmative action" as "anti-subordination." In assessing measures that purport to be "affirmative action," the courts would focus on the actual effects of a policy within a social and historical context. Moreover, consideration of the principle of anti-subordination would not weaken the overall level of scrutiny; instead, allowing the justification of anti-subordination would infuse meaningful content into the concept of strict scrutiny. Rather than being "fatal in fact," strict scrutiny would be able to uphold facially differentiating policies or actions that serve to redress subordination.

C. Rewriting the Race Cases

Under the proposed framework, the University of California could have defended the Davis admissions program in two ways that were unavailable at the time of *Bakke*. First, it could have rebutted Allan Bakke's prima facie case by showing that its race-conscious admissions program did not have a subordinating disparate impact on the basis of race. It could have produced evidence of the educational opportunities in medicine that are available in the California area to minorities and to whites. Specifically, it could have introduced evidence of past and present racial discrimination in the California public school system,[257] the history of the Davis medical school's exclusion of racial minorities,[258] and the unreliability of the Medical College Admission Test (MCAT) as an indicator of minority performance in medical school.[259] In this light, the Davis program created equal opportunity where none had previously existed.

If Allan Bakke had been able to show a disparate impact on white applicants, the university would have had a second opportunity to defend its policy at the justification stage with similar evidence of the historical lack of opportunities that blacks have had in the medical profession, as well as with a showing that an increase in the number of black doctors in

257 Professor Bell argues that had minority groups been represented directly in the *Bakke* case, they would have introduced evidence from previous decisions finding racial discrimination in the California schools. Bell, Bakke, supra note 5, at 6 & n.9.

258 When the school opened in 1968, no blacks or Chicanos were admitted, and only two blacks and Chicanos were admitted in 1969. Bell, Bakke, supra note 5, at 6.

259 According to the Association of American Medical Colleges, blacks can succeed in medical school with a lower MCAT than whites, where success is defined as uninterrupted progress through the first two years of medical school. See Bell, Bakke, supra note 5, at 7 n.11.

the community could help reduce subordination. The difference between the analyses at the prima facie and justification stages is that the court would focus on the effects of the policy on the plaintiff's class (whites) at the first stage and on its effects on the subordinated group (blacks) at the second stage. Thus, even if the case got to the justification stage, one would expect the policy to withstand scrutiny under the proposed framework.

This proposed framework could also support a predominantly black institution. A court would respect the decision of an institution to be predominantly black if the institution could show that its composition helped to redress a history of racial discrimination. At the stage of justification, Howard University Law School would be able to argue that it wanted to *prefer* blacks in hiring or admissions in order to serve the black community more effectively. Although it is difficult to state with confidence whether the black community is best served by a predominantly black institution, it is important to have an equal protection framework that can uphold this choice, so long as it is firmly connected to the principle of anti-subordination.

D. Rewriting the Sex Cases

As one of the central goals of this Article is to develop an analytic framework in which cases of sex discrimination are taken more seriously, this next section focuses on two previously discussed cases that have applied the existing intermediate scrutiny approach, *Michael M. v. Superior Court*[260] and *Mississippi University for Women v. Hogan*.[261] The purpose of this discussion is not to show that the proposed framework would automatically have obtained a different result in each case, but rather to show that the limitations of the prevailing framework of intermediate scrutiny prevented the Court from even beginning to ask the questions that are essential to an equal protection analysis from an anti-subordination perspective.

The *Michael M.* case would look very different under an anti-subordination analysis. First, the Court would inquire whether the application of the statutory rape provision had a disparate impact on the basis of sex. Justice Rehnquist assumed that the state statute produced such a disparate impact because he assumed that the state would prosecute males who had sexual relations with underage females[262] but not females who had sexual relations with underage males. His assumption is based on

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260 450 U.S. 464 (1981); see text accompanying notes 172-82 supra.

261 458 U.S. 718 (1982); see text accompanying notes 234-45 supra.

262 See *Michael M.*, 450 U.S. at 466 ("The statute thus makes men alone criminally liable for the act of sexual intercourse.").

heterosexual stereotyping, which may in fact reflect reality, but there is no way to know from the record available in *Michael M.* Nevertheless, the prosecution of only one of the two actors involved in the sexual act could support a conclusion of disparate impact.[263]

If the plaintiff established a prima facie case of discrimination, then the inquiry would move to the justification stage. The sole justificatory question would be: Does this statute further or remedy the subordination of women? To answer this question, one would have to listen to voices of underage females. Their voices, however, were conspicuously absent from this case, and it was therefore difficult to know their views on the effect of this statute. Under an anti-subordination perspective it would be essential to have at least the underage female, Sharon, for whose protection the statute supposedly exists, be an active party in the prosecution.[264] If application of the statute would further women's subordination, then we could hope that the individual woman would not agree to the prosecution. However, under the California statutory rape law the state did not have to seek Sharon's permission to prosecute. The Court should therefore have remanded this case with instructions to inquire: Did she welcome the prosecution? Or did this prosecution represent yet one more way in which she was not given control over her life and liberty? Did this entire prosecution and lawsuit empower Sharon or rob her of control?

A revised perspective on the statute, one that focuses on subordination, would eventually force the use of the statute for what women really want, which is prevention and punishment of coercive sexual encounters. Sharon's cries of coercion would recieve dominant consideration rather than be hidden in a footnote.[265]

Justice Rehnquist purported to consider women's interests when he discussed whether women face disabilities from their ability to become pregnant. But his discussion of women's interests was very removed from reality. The real issue in *Michael M.* was the lawfulness of particu-

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263 But again, one would have to show that this impact occurred on the basis of *sex*. It is only on the basis of sex if one assumes that the two participants in the sexual act are of the opposite sex. For a critique of statutory rape laws from an anti-differentiation perspective, see Williams, The Equality Crisis, supra note 2, at 185-88.

264 For further discussion of this idea, see Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387, 407-09 (1984).

265 There was strong evidence of coercion in this case. Justice Blackmun quoted an exchange from the hearing, in which Sharon testified that she kissed Michael, but then told him to stop, and said she did not want to take her pants off; she testified that she eventually submitted after he slugged her in the face. *Michael M.*, 450 U.S. at 484-85 n.*. Justice Blackmun cited the testimony for the proposition that Sharon appeared "not to have been an unwilling participant in at least the initial stages of the intimacies that took place." Id. at 483. A prosecution with her consent might have helped Sharon gain the control over her sexuality that Justice Blackmun seems to have assumed she had.

lar sexual behavior. An examination into the history of statutory rape laws shows that they were viewed as a means to control male sexual aggression and to attack the double standard of sexual morality.[266] In assessing the constitutionality of such laws, the Court should have inquired whether individuals should be prosecuted for engaging in sexual acts with an underage female. To answer that question, the Court would have to know about the coercive and oppressive nature of the sexual behavior in question. Do underage girls, generally, need to be protected from aggressive sexual behavior? Did Sharon? That is the most immediate question.

Turning to a reassessment of *Mississippi University for Women v. Hogan*,[267] one would first ask whether the male plaintiff had as many opportunities to study nursing as the average woman, that is, whether the single-sex admission policy had a disparate impact on men. Admittedly, this would be a difficult question to resolve. For example, one might consider how many men and women applied to the nursing programs in all of the state's universities and how many of each sex were admitted. If the additional spaces available for women, by virtue of the MUW policy, only reflected a higher interest in nursing among women, then a court might not find a prima facie case of discrimination under the proposed framework. Unfortunately, the answer might not be that simple because of the invidious factors that undoubtedly influence applicant flow. Since men are unlikely to apply for a program that advertises "for women only," the facially differentiating admissions policy may skew the disparate impact analysis. Nevertheless, under the new framework, the fact that the university used sex-specific language would not be determinative of the prima facie discrimination issue.[268] Some considerations of the effect of the policy would have to be made.

If it were determined that the policy in *Hogan* did produce disparate impact, then the case would proceed to analysis on the critical issue—the policy's contribution both to a history of inequality and to the existing circumstances of inequality. This analysis would produce a rich discussion of the important role that single-sex or predominantly female insti-

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266 For an excellent discussion of this history, see Olsen, supra note 264, at 402-04.

267 458 U.S. 718 (1982); see text accompanying notes 234-45 supra.

268 However, one would have to inquire whether the sex-specific rule violated any other constitutional requirement. For example, many southern school systems created sex-segregated education *after* court-ordered racial desegregation was imposed. See Note, The Constitutionality of Sex Separation in School Desegregation Plans, 37 U. Chi. L. Rev. 296, 297 & n.14 (1970) (citing 12 cases in which sex segregation followed court-ordered racial desegregation). These school systems did not want black boys and white girls to be educated together. Id. at 300-01. If the purpose of this policy was to undermine racial desegregation, there would be a prima facie case of discrimination, but with regard to race rather than sex.

tutions may serve in eliminating the subordination of women.[269] Rather than focus on sexual stereotyping, as did the *Vorchheimer* court in upholding single-sex education for both boys and girls,[270] the inquiry would turn to subordination. For example, the court would probe whether the availability of female bonding in an all-female or predominantly female school facilitated women's emancipation. The answer would depend upon the nature of the institution. A very traditional school that emphasized teaching women housekeeping skills and etiquette, or even nursing, might not serve the purpose of anti-subordination, but a highly politicized all-women's school might. The court should ask: Does the institution reinforce traditional views of women or does it provide women with the skills and tools to fight their subordination?

CONCLUSION: THE REMAINING DIFFICULTIES

One might argue that this Article's proposed framework raises more difficulties than it resolves. How does one define disparate impact? Can the analysis be applied to classifications other than race or sex? How subordinated must one's group be to trigger this analysis? At what point is the subordination of a group sufficiently redressed, so that it can no longer claim entitlement to differentiating policies designed to redress its prior history of subordination? What policies redress subordination? Are there truly no principles other than anti-subordination that should justify race- or sex-specific policies or actions?

These are hard questions that cannot be addressed theoretically. If we are committed to the principle of anti-subordination, then we should be equally committed to finding the answers to these questions in specific factual settings. In this Article, I have not tried to resolve all of these questions; instead, I have set forth a principle and framework under which we can begin to answer these questions. Recently, the courts have begun to explore the importance of the anti-subordination principle in resolving affirmative action disputes, but have not yet tried to incorporate this principle more fully within all of equal protection doctrine. I have therefore tried to show the power of the anti-subordination principle as a tool in assessing all claims of inequality, not simply claims of reverse discrimination. Consistent application of the anti-subordination principle would be an important step in our journey towards equality.

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269 See Feldblum, Krent & Watkin, supra note 233.

270 See text accompanying notes 229-33 supra.